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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 1158

LOUISVILLE CHAIR COMPANY, INC., - Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD and UNITED FURNITURE WORKERS OF AMERICA, LOCAL #236, AFL-CIO, - - Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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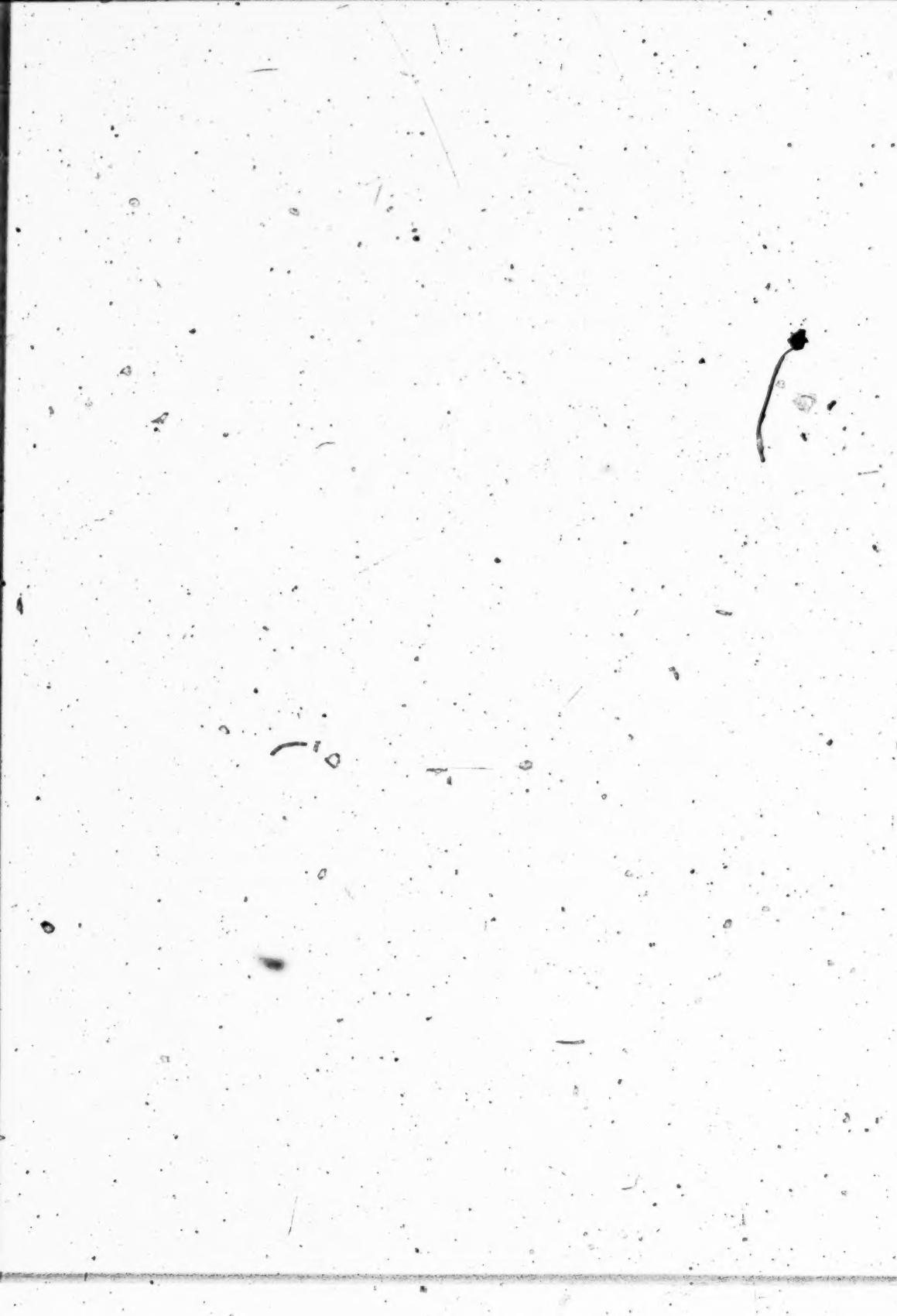

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. _____

LOUISVILLE CHAIR COMPANY, INC., - *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD and UNITED FURNITURE WORKERS OF AMERICA; LOCAL #236, AFL-CIO, - *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Louisville Chair Company, Inc. (hereafter called "the company"), by counsel, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit rendered in the above-captioned case on December 1, 1967.

OPINIONS BELOW.

The opinion of the Court of Appeals is reproduced in Appendix A hereto (pages 1a-12a) and is reported at 385 F. 2d 922 (1967). The decisions and orders of the trial examiner and the National Labor

Relations Board in this case (which were enforced by the Court of Appeals) are reproduced in Appendix B hereto (pages 13a-69a) and are reported at 161 NLRB No. 31 (1965).

JURISDICTION.

The aforesaid judgment of the Court of Appeals was entered on December 1, 1967 (Appendix A, page 1a). The jurisdiction of this court is invoked under 28 U. S. C. § 1254(1) and Section 10(e) of the National Labor Relations Act, as amended, 29 U. S. C. § 160(e).

QUESTIONS PRESENTED.

1. Whether it was erroneous, improper and a denial of procedural due process for the National Labor Relations Board (hereafter called "the Board") and the Court of Appeals to deny Louisville Chair Company, Inc., a hearing, at some stage of the proceedings in this case or in the related representation case, on the Company's objections to the union representation election held by the Board on May 27, 1965, in a unit composed of the Company's production and maintenance employees, those objections being on the ground of substantial and material misrepresentations about the Company's profits knowingly made by the Furniture Workers Union to the employees prior to that election, at a time when the Company did not have an opportunity to make an effective reply, and also on the ground of irregularities in the conduct and results of the election, as evidenced by the admitted fact that

there were more ballots in the ballot box than there were voters.

2. Whether the Furniture Workers' strike of the Company's production and maintenance employees which began on August 17, 1965 was an unfair labor practice strike in protest of the Company's refusal to bargain with the Furniture Workers Union, or whether the Furniture Workers' strike was an economic sympathy strike in support of a strike of the Company's truck drivers in a separate bargaining unit which was previously begun against the Company by Teamsters Local Union No. 89, where the undisputed evidence showed and the Board found that despite the Company's refusal over a period of several months to recognize and bargain with the Furniture Workers Union, the immediate precipitating cause of the Furniture Workers' strike was the Teamsters' strike in the bargaining unit of truck drivers.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The relevant provisions of the Constitution of the United States, the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. §§151, *et seq.*), the Statements of Procedure of the National Labor Relations Board—Series 8, as amended (29 C. F. R. §§101.1, *et seq.*), and the Rules and Regulations of the National Labor Relations Board—Series 8, as amended (29 C. F. R. §§102.1, *et seq.*) are set forth in Appendix C hereto (pages 71a-79a).

STATEMENT.

The facts in this case are substantially set out in the opinion of the court below, which reiterated the findings of the Board and its trial examiner. However, we believe it would be in order to very briefly review those facts here for the benefit of the Court.

This case arises from a representation election held by the Board on May 27, 1965 in a unit composed of the Company's production and maintenance employees, to which election the Company filed timely objections with respect to conduct affecting the results of the election and to the conduct of the election. This election was ostensibly won by the Union by a vote of 187 to 112 (J. A. 441a-442a.)[1] The Company also filed a timely request for a hearing on its objections to the election (J. A. 530a-531a).

These objections were overruled by the Board's Ninth Regional Director on the basis of an *ex parte* investigation, he denied the Company's request for a hearing on the objections, and he also certified the Union as the collective bargaining representative of the voting unit employees on the basis of the contested election (J. A. 443a-447a). The Board sustained the Regional Director by peremptory telegraphic orders (J. A. 484a, 491a).

In order to contest the findings in the representation case, and the resulting certification of the Union, the Company refused to bargain with the Union (J. A. 43a-44a). This resulted in unfair labor practice charges

[1] "J.A." refers to the Joint Appendix of the Board and the Company in the court below.

being filed against the Company, which were litigated before a trial examiner of the Board, the Board itself and the court below (J. A. 4a-60a, and Appendix A hereto).

On August 17, 1965, while the Company's objections to the election were still pending before the Board, the Union called a strike of the Company's employees whom it purportedly represented (J. A. 47a-51a). As the trial examiner found (and his findings were adopted by the Board), the strike by the Furniture Workers Union was called and began *after* Local 89 of the Teamsters Union commenced a strike by the Company's truck drivers (whom it represented), the Furniture Workers had been coordinating their efforts with those of the Teamsters, and the Furniture Workers' National Organizational Coordinator Silverman informed the Company's counsel on the morning of August 17, 1965, before the strike began, that the Furniture Workers would strike because of the Teamsters' strike in order to help the Teamsters and would "respect the Teamster picket lines" (J. A. 48a-51a).

On the basis of the record before him, the trial examiner concluded as follows with respect to the cause of the Furniture Workers' strike:

> "It is evident from the above that the timing of the strike was influenced and probably determined by the breakdown in the negotiations between Respondent and the Teamsters. It may well have been that but for the Teamsters' strike, the Union would not have struck at least until after the Board had acted upon Respondent's appeal

from the certification. To that extent the Teamsters' strike was certainly a cause of the Union's strike . . ." (J. A. 52a).

However, the trial examiner went on to hold that another cause of the strike was to protest the Company's refusal to bargain with the Union. Since the trial examiner also found that the election was valid and that the Union was properly certified, he held that the Company's refusal to bargain with the Union was unlawful and thus the strike was an unfair labor practice strike (J. A. 52a-53a).

The grounds for the Company's objections to conduct affecting the results of the election were that the Union made material and substantial misrepresentations in handbills distributed to the Company's employees before the election at a time when the Company could not make an effective answer to those statements. The deceptive and misleading statements were made in two handbills which were disseminated shortly before the election (J.A. 443a-444a).

The first handbill concluded as follows:

> "So let the speeches come—Let the Company's lies and propaganda flow. When the time comes—Join the majority of Louisville Chair workers and vote YES. The Company's gross profit for the last fiscal year was—$1,730,111.00—VOTE YES. Lets get our share of the pie!!" (J. A. 448a).

The second handbill concluded in an even stronger vein, to-wit:

"TAKE A GOOD LONG LOOK AT WHAT THESE UNION WORKERS ARE MAKING.

"THEN TAKE ANOTHER LONG LOOK AT YOUR LAST PAY-CHECK STUB.

"TAKE ANOTHER LOOK AT THE LOUISVILLE CHAIR COMPANY'S GROSS PROFIT FOR THE FISCAL YEAR ENDING JUNE 30, 1964—$1,730,111.00!" (J. A. 449a-450a).

Both of these handbills were prepared by the Union at a time when it most certainly knew (according to the Company's proffered but rejected evidence on this point, which has never been denied) that the Company's *net income* for the fiscal year ended June 30, 1964 was only $244,198.00 and that the *gross profit* was subject to deductions of $1,210,487.00 for expenses and $278,145.00 for Federal income taxes before Respondent's net income could be determined (J. A. 241a, 307a, 536a-537a, 541a).

Furthermore, as the Company's proffered and uncontradicted but rejected evidence shows, the eligible voters did not understand the technical accounting term "gross profit" as used in the handbills and would have been misled and deceived into thinking that the Company had a $1,730,111.00 profit for its last preceding fiscal year which was available to be paid to them in the form of wage increases, as promised to them by the Union (J. A. 303a-304a, 311a, 546a-547a).

The basis for the Company's objections to the conduct of the election was the "apparent" fact, as found by the Regional Director in Case No. 9-RC-6223, "that there were two more ballots cast than is indicated by

the check marks on the eligibility list" which was used by the Company and Union observers in registering the voters in the election (J. A. 445a).

The Company's proffered but rejected testimony on this question was that the observers for both the Company and the Union at the May 27, 1965, election "exercised the utmost care to check off the eligibility list the name of each and every voter to whom a ballot was given by the Board agent", that it "is absolutely certain beyond any doubt whatsoever that no eligible voter was given a ballot . . . without the voter having his or her name checked off the eligibility list by both" observers, that the two observers and the Board agent who supervised the election agreed there were seven names on the list which had not been checked off, that Company and Union representatives agreed there were 307 names on the list, and that there were two more ballots in the ballot box than there were actual voters in the election (J. A. 299a-301a, 532a-533a).

The Board and its agents have consistently refused the Company's requests for the names of the seven people who were not checked off the elgibility list and refused to let the Company copy those names off the list (J. A. 300a, 555a-556a).

The Company only knows that in the course of investigating its objections to the election, *ex parte,* a Board agent requested the home addresses of four people named on the list (J. A. 556a). Two of those four people were among the five people in the unit who were not present on the Company's premises and did not vote on the day of the election, one having quit be-

fore the election and the other having been on a medical leave of absence for more than a month (J. A. 553a-554a). The only other result of the Board's investigation or evidence submitted to the Board in the course of the investigation which the Company has been able to discover is that one of the seven unnamed employees whose names were not checked off the eligibility list allegedly claimed to have voted in the election (J. A. 556a).

Aside from this, the Board has effectively prevented the Company from investigating the reason for the discrepancy between the number of ballots and the number of voters, and the Board has also refused to disclose to the Company the results of or the facts found from the Board's investigation of this situation (J. A. 555a-557a).

The Board's Ninth Regional Director, the trial examiner and the Board (by adopting the decisions of its Regional Director and the trial examiner in this respect) held that the Company was not entitled to a hearing on its objections to the election because in their view those objections did not raise substantial and material factual issues (J. A. 4a-7a, 44a-46a, 445a-446a, 484a, 491a). The trial examiner excluded all evidence in support of the objections which the Company sought to introduce at the hearing before him in the unfair labor practice case (J. A. 44a).

Subsequent to the Board's decision in the unfair labor practice case, it petitioned the United States Court of Appeals for the Sixth Circuit for enforcement of that order pursuant to the National Labor Re-

lations Act, as amended (61 Stat. 136, 29 U. S. C. §§151 *et seq.*, as amended by 72 Stat. 519). The Furniture Workers Union was permitted to intervene in the enforcement proceedings. After filing of briefs and oral argument by the Board, the Company and the Union, the court below granted the Board's petition by its decision of December 1, 1967.

REASONS FOR GRANTING THE WRIT.

The decision in this case by the Sixth Circuit Court of Appeals merits review by the Supreme Court within the standards set by Rule 19 of the Rules of the Supreme Court of the United States because that decision is in conflict with decisions of other courts of appeal with respect to the Company's right to a hearing on its objections to the election and the nature of the strike, the Supreme Court has not settled these important questions of federal law, and the decision of the court below has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

1. *The Company's right to a hearing.* The Company's primary argument is that it was entitled to a hearing at some stage of the representation case or the unfair labor practice case on its objections to the election, inasmuch as those objections did raise substantial and material factual issues. The court below summarily disposed of this issue by merely saying that the Company only questioned " 'the interpretation and inferences placed upon the facts by the Regional Direc-

tor' ", but did not " 'clearly demonstrate that factual issues exist which can only be resolved by an evidentiary hearing' " or " 'state the specific findings that are controverted and . . . show what evidence will be presented to support a contrary finding or conclusion' " (Appendix A, page 10a).

Actually, the reverse is true. The record in this case establishes beyond question or doubt that the Company has clearly endeavored at every stage of these proceedings to state and show that it was controverting the Board's findings as to the Union's misrepresentations and the irregularity in the conduct of the election. The Company has not only shown what evidence it would present to support a contrary finding or conclusion, but also submitted affidavits and, at the unfair labor practice case hearing, unsuccessfully sought to elicit testimony in support of its objections to the election from its own witnesses, the Union's chief representative in this case, and the appropriate officers and agents of the Board. *The only reason this testimony is absent from the record is the persistent refusal of the trial examiner and the Board to admit it.* The Company subpoenaed the officers and agents of the Board who had made the *ex parte* investigation of the Company's objections and who had knowledge of the facts with regard to the election, to appear at the hearing in the unfair labor practice case, but the trial examiner and the Board quashed those subpoenas on motion of counsel for the Board's General Counsel (J. A. 263a-265a, 599a).

The Board itself has effectively prevented the Company throughout every step and every stage of both the representation case and the unfair labor practice case from investigating and bringing to light the facts with regard to the Union's misrepresentations to the employees and the disparity between the number of ballots and the number of voters. Thus, if the Company did not " 'clearly demonstrate that factual issues exist which can only be resolved by an evidentiary hearing' " (as the court below found, but which the Company vigorously denies), *that was due solely to the suppression of evidence by the Board and the Board's deliberate failure to disclose any facts which would support the Company's objections to the election or which would detract from the Board's findings and conclusions.* This in itself was improper and cause to set aside the Union's certification and dismiss the unfair labor practice case. Compare *Giles* v. *Maryland,* 386 U. S. 66 (1967).

Moreover, the Company did meet the standards required by the Board in order to justify its request for a hearing on its objections to the election.

In this connection, we call the Court's attention to the erroneous reliance placed by the court below on "Section 102.69(e)(1), 29 C. F. R." of the Board's rules and regulations. That section pertains only to "a case involving a consent election held pursuant to Section 102.62(b)", *but not to a contested representation case such as Case No. 9-RC-6223 involving the Company was.* Thus, in dismissing the Company's

claim of a right to a hearing, the court below cited and relied upon inapplicable authority.

The section of the Board's Rules and Regulations which is pertinent to the Company's representation case is at 29 C. F. R. §102.69(c). This section applies if an "election has been conducted pursuant to a direction of election issued following any proceeding under Section 102.67", which was the situation in the case at bar (J. A. 412a-416a, 441a-442a). This section at the time the representation case was pending went on to provide that "if it appears to the regional director that substantial and material factual issues exist which can be resolved only after a hearing", the regional director could only rule on objections to an election "on the basis of a hearing".

We submit that the Company met these requirements more than adequately.

First, the Company offered proof of a material and deceptive misrepresentation by the Union to the Company's employees, namely, talking about getting their "share of the pie" composed of the Company's "gross profit", at a time when the Union knew this was a distortion of the Company's financial condition and when the Company could not effectively answer it because of the proximity of the election date and the low level of education of those employees. Thus, this evidence raised the "substantial and material factual issues" of whether in fact the Union made this misrepresentation knowingly and whether the Union did so with the deliberate intent that it would have an impact on the employees, inflame them against the Company and

affect their vote because of their lack of education and the Company's inability to effectively reply.

In this connection, we call this Court's attention to the very recent decision of the Fourth Circuit Court of Appeals in *Schneider Mills, Inc.* v. *N. L. R. B.*, —— F. 2d ——, 57 CCH Lab. Cas. ¶12,458 (4th Cir., decided January 8, 1968). This case is virtually identical in principle to the case at bar. There, a union apparently won an election by a vote of 211 to 154. However, it passed out handbills two weeks before the election and also three days before the election, with a third handbill on the evening before and the day of the election. These handbills contained various misrepsentations and inflammatory statements about the employer, which the employer attempted to rebut in its own handbill distributed the day before the election. The Fourth Circuit overruled the Board's certification of the union because of the handbills immediately before the election, stating:

> "To the extent that previously made misrepresentations were repeated, we think that their vitiating effect on the validity of the election can be obviated only if the company had a second opportunity to make an *effective* reply . . . . Such a rule, we think, was prescribed by the Board in *The Gummed Products Company, supra,* at 1094, and the Board abused its discretion by not applying it in this case" (Our emphasis).

Similar misrepresentations have often been held to be cause for setting aside elections held by the Board.

N. L. R. B. v. *Trinity Steel Company,* 214 F. 2d 120 (5th Cir., 1954); *Celanese Corporation of America* v. *N. L. R. B.,* 279 F. 2d 204 (7th Cir., 1960), *rem.* 365 U. S. 297, *aff'd.* 291 F. 2d 224 (7th Cir., 1961), *cert. den.* 368 U. S. 925; *N. L. R. B.* v. *Houston Chronicle Publishing Company,* 300 F. 2d 273 (5th Cir., 1962); *N. L. R. B.* v. *Trancoa Chemical Corporation,* 303 F. 2d 456 (1st Cir., 1962); and *N. L. R. B.* v. *Bata Shoe Company, Inc.,* 377 F. 2d 821 (4th Cir., 1967). Similar decisions have been rendered by the court below, *Cross Company* v. *N. L. R. B.,* 286 F. 2d 799, *reh. den.* 288 F. 2d 188 (6th Cir., 1961), and by the Board itself, *Hollywood Ceramics Co.,* 140 NLRB 221 (1962).

Furthermore, the Company offered evidence that there were two more ballots in the ballot box than actual voters. This fact by itself and on its face (in addition to the Board's suppression and concealment of the results of its investigation, including the Board's admitted destruction of the ballots, J. A. 501a-502a) raised the "substantial and material factual issues" of whether the election was properly conducted and whether there had been some sort of vote fraud so as to invalidate the election.

Conduct and situations far less grave in nature than these have often led the Board and the courts to set aside elections. See *N. L. R. B.* v. *Bata Shoe Company, supra; Bullard Company* v. *N. L. R. B.,* 253 F. Supp. 391 (D. D. C., 1966); and *Athbro Precision Engineering Corporation,* 166 NLRB No. 116 (1967), set aside *sub. nom. International Union of Electrical*

Workers v. *N. L. R. B.*, —— F. Supp. ——, 57 CCH Lab. Cas. ¶12,440 (1968).

The integrity of the Board's election processes requires a hearing when under the facts and circumstances the petitioner raises a substantial and material question concerning the reason why there were more ballots cast than accounted for. It should make no difference that the number of ballots involved were not decisive as to the outcome of the election, for it is not the arithmetical count that is in question, but it is the integrity of the election process itself that is on trial where any taint of misconduct permeates the entire process. Whether the basis of the apparent irregularity could ever be cleared up or not, at the least the parties are entitled to the safeguards of a hearing on the issue.

Under circumstances such as those in the instant case, and by the great weight of authority, the Company was entitled to a hearing on its objections to the election. *N. L. R. B.* v. *Indiana & Michigan Electric Company*, 319 U. S. 9 (1943); *N. L. R. B.* v. *Bata Shoe Company, supra; N. L. R. B.* v. *Capital Bakers, Inc.*, 351 F. 2d 45 (3rd Cir., 1965); *N. L. R. B.* v. *Poinsett Lumber and Manufacturing Company*, 221 F. 2d 121 (4th Cir., 1955); *N. L. R. B.* v. *KVP Sutherland Paper Company*, 356 F. 2d 671 (1966); *Firestone Synthetic Fibers Company* v. *N. L. R. B.*, 374 F. 2d 211 (4th Cir., 1967); *General Engineering, Inc.* v. *N. L. R. B.*, 341 F. 2d 367 (9th Cir., 1965).

The court below erroneously relied upon its prior opinion in *N. L. R. B.* v. *Tennessee Packers, Inc.*, 379

F. 2d 172 (6th Cir., 1967), in denying the Company's contention that it was entitled to a hearing. In *Tennessee Packers,* the employer did not offer any evidence in support of its objections nor was it clear what the basis for the objections was nor did the employer request a hearing on its exceptions to the Regional Director's findings. Obviously, none of those conditions exist in the case at bar, and thus *Tennessee Packers* is distinguishable and inapplicable. Again, as with respect to the applicable Board rule, the court below erred with prejudice to the Company in denying it the right to a hearing.

Under the facts and circumstances in this case, and under all applicable authority, we respectfully submit that the Company was entitled to a hearing on its objections, that the denial of a hearing constituted a denial of procedural due process, and consequently the Union was improperly certified by the Board and it was not unlawful for the Company to refuse to bargain with the Union.

2. *The nature of the strike.* As the court below correctly stated in Footnote 3 to its decision, 385 F. 2d 922, 928, "sympathy strikers are only entitled to the same statutory protection as the economic strikers whom they support", and "if the instant strike was merely a sympathy strike, the Respondent would not be required to reinstate the strikers as ordered by the Board." We earnestly submit that the facts in this case clearly demonstrate that the strike by the Furniture Workers Union was merely one in sympathy with and support of the strike previously begun by the

Teamsters Union. *Cf., Crown Coach Corporation,* 155 NLRB 625 (1965), and *Filler Products, Inc.,* v. *N.L.R.B.,* 376 F. 2d 369 (4th Cir., 1967).

Although the Regional Director initially certified the Furniture Workers Union on July 16, 1965 (J. A. 447a) and on July 19, 1965, the Union requested negotiations with the Company (which was refused by the Company, J. A. 492a-493a, 505a-506a), the Union did not strike until August 17, 1965. Moreover, this was after the Company had been assured by representatives of the Union that it would not strike until the Company's pending objections to the election had been resolved by the Board (J. A. 49a-50a). This was, however, also after the Teamsters Union began its strike, was pursuant to the coordination of efforts between the two unions, and was after the Company's counsel had been informed by the Furniture Workers Union that they would help the Teamsters in every way they could and that the Company's employees had voted to strike in the event the Teamsters went on strike (J. A. 48a-51a).

Obviously, the contention by the Furniture Workers Union that it went on strike because of the Company's refusal to bargain with it is merely a self-serving second thought to try to bolster its position.

Moreover, even if the Furniture Workers Union called the strike because of the Company's refusal to bargain with it, that strike could not be and was not an unfair labor practice strike, because the Company was legally justified in refusing to bargain with the improperly certified Furniture Workers Union for the reasons mentioned above.

CONCLUSION.

We respectfully submit it is clear from the foregoing that the decision of the court below with respect to the Company's right to a hearing and the nature of the strike was prejudicially erroneous. We further submit that this decision is in conflict with decisions of other courts of appeal, this Court has not settled the important questions of federal law here presented, and the decision of the court below has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

We therefore earnestly request that this petition for a writ of certiorari be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 17803

NATIONAL LABOR RELATIONS BOARD, - - *Petitioner,*

v.

LOUISVILLE CHAIR COMPANY, INC., - - *Respondent.*

On Petition for Enforcement of an Order of the National Labor Relations Board.

Decided December 1, 1967.

Before: EDWARDS, CELEBREZZE and PECK, Circuit Judges.

CELEBREZZE, Circuit Judge. The National Labor Relations Board brings this petition to enforce its order against Respondent Louisville Chair Company, Inc. United Furniture Workers of America, AFL-CIO, Local 236, was granted permission to intervene. The Board found that in opposing the organization of its workers by Local 236, United Furniture Workers of America, AFL-CIO, the Respondent violated Sections 8(a)(1), (3), and (5) of the Labor Management Relations Act, 29 U.S.C. §§ 158(a)(1), (3) and (5). The Board ordered[1] the Company to cease its unfair labor practices, to bargain collectively with the Union, to reinstate the striking employees with back pay, and to offer employment with back pay to Joseph E. Sweet, who had been refused employment because of his past

[1]Louisville Chair Company, Inc., 161 N.L.R.B. — (No. 31) (1965).

Union activities. We grant enforcement of the Board's order.

(1) Violations of §§ 8(a)(1) and (3).

The charge that the Respondent restrained or coerced its employees in the exercise of their right to self-organization in violation of § 8(a)(1) is based upon two incidents. In one a Company foreman, Pry, engaged an employee, Vittitow, in what the Trial Examiner characterized as a "bantering" conversation. In the course of the conversation Pry asked Vittitow how the Union meeting had gone the night before. Vittitow replied that it had gone all right but that he had not seen anything of Pry or his spies there. Pry retorted that "his spies were smart for staying out of the Union and he said anybody involved in the Union would definitely be fired." The Trial Examiner found that Pry did not temper the remark either by additional comment or manner of delivery and therefore, concluded that Pry's conduct tended to interfere with the free exercise of employees' rights under the Act.

The second incident concerned discriminatory application of a rule against solicitation during working hours. A foreman reported to the Respondent's general superintendent, Wedding, that he had observed an employee, Spencer, showing some Union buttons to other employees during working hours. The following day Wedding went to Spencer's department and stood for about ten minutes on a landing ten feet behind Spencer's work station from which position he observed Spencer showing a Union button, which Spencer was wearing, to Green, a deaf mute employee who worked beside him. Spencer said something to Green similar to "you should be wearing one of these." Green continued to work; Spencer, whose job was to turn sewn chair back covers inside out and to sort them, paused in his work while showing the button to Green and talking

to him. Wedding estimated that the incident took no more than fifteen or twenty seconds.

After observing this exchange, Wedding approached Spencer and told him that if he would spend more time on his work and less on Union activity, they would get along better and warned Spencer that if he was caught passing out Union buttons or literature on Company time, he would be discharged. Wedding then told the department foreman to inform him if Spencer engaged in any Union activity whatsoever on Company time. With respect to momentary pauses in work, Wedding testified on cross-examination:

> "Q. Was it unusual for an employee regardless of what he does now to take a five second interval between turning backs occasionally?
>
> "A. It would be very unusual for an employee to take five seconds out to engage in Union activity.
>
> "Q. That's not my question, Mr. Wedding.
>
> "A. If an employee took five seconds out just to stop for five seconds I wouldn't say anything to him, but if he's engaged in Union activity he's going to get it.
>
> "Q. What if he took ten seconds out just to stop?
>
> "A. I wouldn't say anything about that.
>
> "Q. How about twenty, how about a minute?
>
> "A. No. If he's engaged in Union activity you would toss him right out of the joint?
>
> "A. I might, it all depends. I have warned them, I warn them usually my procedure would be to warn them as in the case with Saul Spencer."

From this testimony it was obvious that the Company permitted momentary pauses in work and that employees were generally free to talk while working, as long as they worked efficiently. Therefore, the Trial Examiner concluded that the only vice Wedding perceived in Spencer's

conduct was that the pause and talking were utilized for Union activity; hence, he determined that Wedding's threat of discharge unfairly enforced the Respondent's no solicitation rule.

Respondent's violation of § 8(a)(3) is predicated upon its refusal to employ Joseph E. Sweet because of his Union activity at his previous place of employment. Sweet, upon referral by the State Employment Service, applied for a job at Respondent's factory at the height of the controversy concerning the legality of the representation election. On his application form Sweet listed Huttig Sash & Door Company, Inc., as his last place of employment, and under the heading, "Why did you leave?", he wrote the single word "discharge." After looking over the application, Miss Ohmann, Respondent's personnel director, asked Sweet why he was discharged by Huttig. When informed that Union trouble had occurred at Huttig and that Sweet was fired because he was fulfilling his duties as a chief steward of the Union,[2] she told him that she could not hire him because the Respondent was having Union problems too. Other evidence was presented, but the Trial Examiner concluded that the refusal to hire Sweet was based on his Union activity.

Respondent concedes that sufficient evidence was presented to support the Board's findings in these matters. But the Respondent contends on the one hand that the violations of § 8(a)(1) are so minor and trivial as not to warrant the issuance of an order and on the other hand that since Sweet has been reinstated by Huttig an offer of employment to him would be a useless gesture. The Act provides that upon a finding ". . . that any person named in the complaint has engaged in or is engaging in any such

[2]An order of the Board issued sometime after Sweet's application at Louisville Chair to require Huttig to reinstate Sweet with back pay. Huttig Sash & Door Company, Inc., 154 N.L.R.B. 125 (1965).

unfair labor practice, then the Board . . . *shall* issue and cause to be served on such person an order. . . ." 29 U.S.C. § 160(c) (emphasis added). In International Woodworkers of America, Local 3-10 v. N.L.R.B., 380 F. 2d 628 (D.C. Cir., 1967), this provision was interpreted as a mandatory requirement that the Board issue an order upon the finding of an unfair labor practice. Whether the provision is mandatory or discretionary, however, we need not decide; for we find that the issuance of an order under the facts of the instant case would not be an abuse of the Board's discretion.

Respondent's reliance upon N.L.R.B. v. Tennessee Coach Company, 191 F. 2d 546 (6th Cir., 1951), and Pittsburgh Steamship Company v. N.L.R.B., 180 F. 2d 731 (6th Cir., 1950), aff'd. 340 U. S. 498 (1951), for the proposition that a remedial order is inappropriate when unlawful remarks by supervisors to employees are of an isolated nature is misplaced. In both of those cases the actions of the employer were held not to be unlawful. Pittsburgh Steamship Company concerned an employer's letter to his employees setting out his position on a representation election. The letter was held not coercive and not a misrepresentation of the facts. Tennessee Coach Company concerned antiunion statements of supervisors, but the Court found that the the statements were not accompanied by any threats or coercion. Here the antiunion actions of Respondent's supervisors were accompanied by a threat of discharge, which is one of the most effective means of coercion. On review of the entire record we are satisfied that when these acts are coupled with the Respondent's refusal to hire Union advocates and its continued refusal to bargain with Local 236, enough substantial evidence is presented to justify the issuance of the Board's order as to these matters. Cf. Sheffer Corporation v. N.L.R.B., 380 F. 2d 1007 (6th Cir., 1967).

Also Respondent's contention that Sweet's reinstatement by Huttig renders moot the back pay order as to him is not supportable. It seems clear that even compliance with an order does not deprive the Board of its right to a decree enforcing that order. N.L.R.B. v. Mexia Textile Mills, Inc., 339 U. S. 563 (1960); N.L.R.B. v. Heck's, Inc., 369 F. 2d 370 (6th Cir., 1966). Here facts necessary to determine the amount of back pay for which the Respondent is liable were neither raised nor resolved in the proceedings before the Board. Such matters can better be resolved in compliance proceedings. Cf. N.L.R.B. v. Talladega Cotton Factory, 213 F. 2d 209 (5th Cir., 1954).

(2) Violations of § 8(a)(5).

On May 27, 1965, a representation election was held among the Respondent's furniture workers. Local 236 received a majority of the votes cast in the election, but the Respondent raised objections to the conduct of the election and to certain discrepancies in the election. After an administrative investigation, without a hearing, the Regional Director overruled the Respondent's objections and on July 16, 1965, certified Local 236 as the employees' collective bargaining representative. Respondent appealed the Regional Director's decision to the Board, but no stay in the certification was sought or ordered. Nevertheless, the Respondent refused to bargain with Local 236 in the interim and still refuses to bargain with it. On August 17, 1965, Local 236 called a strike against the Respondent. On September 1, 1965, the Board denied the Respondent's request for review of the Regional Director's certification. Thereafter, on October 21, 1965, the General Counsel instituted the unfair labor practice proceeding that resulted in the order under review.

The Respondent contends that it had no duty to bargain with Local 236 because of the discrepancies in the election and that, in any event, it had a right to a hearing concern-

ing its objections. Also, the Respondent contends that the strike on August 17th was a sympathy strike, a matter more fully explored later in this opinion, and not an unfair labor practice strike. The Board found, however, that the strike was an unfair labor practice strike and that the Respondent's objections to the election did not raise any substantial or material issues that would warrant a hearing.

The Union's Showing of Interest.

Respondent first objected to the authorization cards that were submitted by the Union to make a showing of interest. It appears that the cards indicated the International Union as the signer's choice of collective bargaining representative and made no mention of Local 236. The Regional Director overruled the objection and proceeded with the election. We find no merit to Respondent's suggestion that the failure to specify Local 236 on the authorization cards vitiates the election.

A showing of interest is not a jurisdictional prerequisite to an election. It is merely a step in the screening process to facilitate the Board's determination under Section 9(c) that a sufficient question of representation is presented to warrant the expense and effort of an election. N.L.R.B. v. National Truck Rental Co., 239 F. 2d 422 (D.C. Cir., 1956); N.L.R.B. v Swift and Company, 294 F. 2d 285 (3rd Cir., 1961). The election decides the substantive issue whether the Union represents a majority of the employees; no statutory purpose would be served by allowing the parties to litigate the question of a showing of interest at a pre-election hearing. See N.L.R.B. v. J. I. Case Co., 201 F. 2d 597, 600 (9th Cir., 1953). In the instant case by the time of the election the voters were fully aware that Local 236 was the organization in question, and the results of the election resolved the question of representation in its favor.

Misleading Campaign Propaganda.

Two weeks before the election the Union distributed a handbill stating in part: "The Company's gross profit for the last fiscal year was—$1,730,111.00—VOTE YES. Lets get our share of the pie!" A second handbill of similar content was distributed a few days before the election. The statement concerning the Company's gross profit was literally true, but Respondent contends that it was misleading since it implied that the full amount was distributable net income, whereas the Company's actual net income was only $244,198.00.

Presumably both figures were available to the Union from a Dun and Bradstreet report on the Respondent, but neither figure accurately reflected the funds actually available for distribution. Faced with a choice between two ambiguous figures the Union could legitimately choose the one favorable to its position. Although its use of the gross profits figure was ambiguous and susceptible to different interpretations, ambiguity in campaign propaganda is not sufficient by itself to vitiate an election. Hollywood Ceramics Co., 140 N.L.R.B. 221 (1962). Here, the information in the handbills did not concern material within the special knowledge of the Union, N.L.R.B. v. Trancoa Chemical Corporation, 303 F. 2d 456 (1st Cir., 1962), and it was not disseminated at a time or in a manner calculated to deprive the Respondent of an opportunity to reply. Cross Company v. N.L.R.B., 286 F. 2d 799 (6th Cir., 1961); N.L.R.B. v. Trinity Steel Co., Inc., 214 F. 2d 120 (5th Cir., 1954).

Respondent contends, however, that regardless of the amount of time available to reply it could not effectively refute the misleading implications of the handbill because of the complexity of the subject involved. To support this contention Respondent attempted to introduce evidence before the Board concerning the complexity of corporation accounting procedures and the educational level of its em-

ployees. The Board rejected this proof, and we are not persuaded by the argument. Having deliberately by-passed its opportunity to reply, the Respondent cannot now contend that the Union campaign material, which was refutable, prevented the exercise of a free choice by its employees in the election of their bargaining representative. Cf. Ralston Purina Co., 147 N.L.R.B.—(No. 65) (1964).

The Election.

The representation election on May 27, 1967, was conducted by the usual Board procedure and resulted in a vote of 187 for and 112 against the Union. Both parties had an observer to check the names of voters as they cast their ballot. Prior to the election a list of 307 eligible voters was compiled. Although 302 ballots were in the ballot boxes, only 300 names were checked off the eligibility list by the Company and Union observers. The Board refused to set aside the election, however, because in its opinion the two ballots could not have possibly affected the outcome of the election. No plausible suggestion was made how the presence of the two extra ballots indicates that something was intrinsically wrong with the election process. The burden of proof in this respect rested upon the Respondent and not the Board; we find that Respondent has failed to meet that burden. N.L.R.B. v. Mattison Machine Works, 365 U. S. 123 (1961).

The Denial of a Hearing.

The issues concerning the Union's showing of interest, the campaign material, and the discrepancy in the ballots were all resolved against the Respondent by the Regional Director and the Board without affording the Respondent a hearing. Section 102.69(e)(1), 29 C.F.R. provides that a hearing should be granted on exceptions to a consent election only when those "exceptions raise substantial and material factual issues." This Court has recently said that

a party does not satisfy that requirement merely by questioning "the interpretation and inferences placed upon the facts by the Regional Director." N.L.R.B. v. Tennessee Packers, Inc., Frosty Morn Division, 379 F. 2d 172, 178 (6th Cir., 1967). In further defining the party's responsibility in this respect, the Court stated:

> "It is incumbent upon the party seeking a hearing to clearly demonstrate that factual issues exist which can only be resolved by an evidentiary hearing. The exceptions must state the specific findings that are controverted and must show what evidence will be presented to support a contrary finding or conclusion." 379 F. 2d at 178.

We are of the opinion that the Respondent did not satisfy this requirement; therefore, the Board was within its discretion in denying a hearing on these matters.

The Strike.

After certification of Local 236 by the Regional Director representatives of the Union requested a meeting with the Respondent to begin negotiations for a collective bargaining agreement. Although no stay of the certification had been requested or granted, the Respondent refused to meet with the Union representatives because of its pending appeal to the Board. On August 5, 1965, the Union sent Respondent a telegram stating that its refusal to bargain was an unfair labor practice and that the Union members had voted unanimously to strike.

Since no stay in the certification had been granted, the Respondent's refusal to bargain was undoubtedly an unfair labor practice. 29 U.S.C. § 153(b); Cf. Old King Cole, Inc. v. N.L.R.B., 260 F. 2d 530 (6th Cir., 1958) (in relation to a similar provision in § 10(g) concerning Board orders, 29 U.S.C. § 160). But the Union did not strike at this time. Instead a meeting between Respondent and

the Union under the auspices of the Federal Mediation and Conciliation Service was held on August 9, 1965. Before the meeting Respondent insisted upon both parties signing a memorandum that this was "an off-the-record meeting . . . and will not be used in any way by either party in any pending or future proceeding." In spite of its prior insistence as to the off-the-record nature of the proceeding, Respondent now contends that a tentative agreement reached at the meeting, by which the Union representatives agreed not to strike until the Board had acted on the Respondent's appeal, prevents the Union's strike on August 17, 1965, from being an unfair labor practice strike.

Respondent insists that the strike on August 17th was a sympathy strike in support of Teamsters' Local 89, which represented Respondent's truck drivers.[3] Respondent and the Teamsters' Local had been negotiating since February, 1965. A leaflet advertising Local 236's August 4th meeting indicated that joint action with the Teamsters' Local was contemplated. After the Teamsters' picket line was established at 11:00 a.m. on August 17th, a meeting of the Local 236 members was held at noon, and a picket line established at 1:00 p.m. The Teamsters' dispute, however, was settled almost two months before the unfair labor practice proceeding under review was instituted. At that time Local 236 was still out on strike and so far as the record indicates is still striking against the Respondent. Also prior to August 17th, Respondent's attorney had been informed by a Union representative that if the Teamsters struck Local

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[3]Sympathy strikes are legitimate Union activity. Cf. N.L.R.B. v. Peter C. M. Swiss Choc. Co., 130 F. 2d 503 (2d Cir. 1942). But sympathy strikers are only entitled to the same statutory protection as the economic strikers whom they support. N.L.R.B. v. City Yellow Cab Co., 344 F. 2d 575 (6th Cir. 1965). Therefore, if the instant strike was merely a sympathy strike, the Respondent would not be required to reinstate the strikers as ordered by the Board. Cf. N.L.R.B. v. Mackay Radio & Telegraph Company, 304 U. S. 333 (1938).

236 would strike and that it's official position would be that its patience had run out because of Respondent's refusal to bargain. In addition another Union official testified that at the noon meeting on August 17th the members of Local 236 voted to strike because of the Respondent's refusal to bargain.[4] His testimony is corroborated by communications between the Respondent and the Union, and by the continuation of Local 236's strike long after the settlement of the dispute between the Teamsters and the Respondent.

Although sympathy with the Teamsters' Local might have been one cause of the strike, it seems clear from the record as a whole that the Board could validly determine that Respondent's unfair labor practice was also a cause of the strike. As long as one cause of the strike is the employers unfair labor practice that finding is sufficient to support the Board's determination that the strike is an unfair labor practice strike. N.L.R.B. v. Sea-Land Service, Inc., 356 F. 2d 955 (1st Cir., 1966); N.L.R.B. v. A. Sartorius & Co., 140 F. 2d 203 (2nd Cir., 1944); N.L.R.B. v. Stilley Plywood Co., Inc., 199 F. 2d 319 (4th Cir., 1952); Butcher Boy Refrigerator Door Company v. N.L.R.B., 290 F. 2d 22 (7th Cir., 1961). A similar rule has been applied to a Union's expulsion of a member. Philadelphia Moving Picture Machine Operator's Union, Local No. 307 v. N.L.R.B., ____ F. 2d ____ (3rd Cir., 1967), 36 Law Week 2105. Having violated the Act, the Respondent cannot choose the one of several causes of the strike that is most favorable to its position.

Since the Board's findings are supported by substantial evidence in the record as a whole, the petition to enforce the order of the Board is granted.

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[4]Because of the substantial corroboration of the testimony of this witness, we find no conflict between the Board's crediting of his testimony and this Court's decision in N.L.R.B. v. Ogle Protection Service, Inc., 375 F. 2d 497 (6th Cir. 1967).

APPENDIX B.

Decisions of the National Labor Relations Board and in Trial Examiner, which are reported in [illegible] (1938):

DECISION AND ORDER.

On April 8, 1966, Trial Examiner David S. Davidson issued his Decision in the above-entitled proceeding, finding that Respondent had engaged in and was engaging in certain unfair labor practices within the meaning of the National Labor Relations Act, as amended, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. The Trial Examiner also found that Respondent had not engaged in other unfair labor practices alleged in the complaint, and recommended that such allegations be dismissed. Thereafter, Respondent filed exceptions to the Trial Examiner's Decision and a supporting brief.

Pursuant to Section 3(b) of the Act, the National Labor Relations Board has delegated its powers in connection with these cases to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and brief, and the entire record in this proceeding, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner, as modified herein.[1]

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[1]The Trial Examiner found that Hale's discharge constituted a violation of Section 8(a)(1) of the Act. In so concluding, he found that the remark made by Hale to Mrs. Napier which precipitated Hale's discharge "was itself inextricable from his union activities." According to the credited evidence, Hale's "union activity" consisted of his wearing a union button for 1 hour before the election and the objectionable remark to a female employee, for which he was discharged. On this state of the record in this proceeding, we do not believe that the General Counsel has sustained his burden of proving that Hale was discharged for union activity. Accordingly, we shall dismiss the complaint in this respect.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the Recommended Order of the Trial Examiner and orders that Respondent Louisville Chair Company, Inc., Louisville, Kentucky, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, as modified below:

1. Delete paragraph 1(b) of the Trial Examiner's Recommended Order, the present paragraphs 1(c), (d), and (e) being relettered 1(b), (c), and (d), respectively.

2. Add the following to the paragraph renumbered 1(d) of the Trial Examiner's Recommended Order, and to the last paragraph of the Notice attached thereto as "Appendix": ". . . , except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959."

3. Substitute the following as paragraph 2(b) of the Trial Examiner's Recommended Order:

"(b) Upon application, offer immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, to all those employees who went on strike on August 17, 1965, or thereafter, and, upon application, offer to Joseph E. Sweet immediate employment at the same position as, or a position substantially equivalent to, that at which he would have been employed had he not been discriminated against, without prejudice to any seniority or other rights and privileges he might have acquired, dismissing if necessary any persons hired on or after August 17, 1965."

4. Substitute the following for the third and fourth indented paragraphs of the Appendix attached to the Trial Examiner's Decision:

> WE WILL, upon application, offer all employees who went on strike on August 17, 1965, or thereafter, immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and we will offer to JOSEPH E. SWEET immediate employment at the same position as, or a position substantially equivalent to, that at which he would have been employed had he not been discriminated against, without prejudice to any seniority or other rights and privileges he might have acquired, dismissing if necessary any persons hired on or after August 17, 1965.
>
> WE WILL make the above-mentioned employees whole for any loss of pay they may suffer as a result of our refusal to reinstate or employ them, upon application, and we will make JOSEPH E. SWEET whole additionally for any loss of pay he may have suffered as a result of our refusal to employ him from the date of such refusal until August 25, 1965, when he rejected an offer of employment because of the strike.

IT IS FURTHER ORDERED that the complaint be, and it hereby is, dismissed, insofar as it alleges violations not found herein.

Dated, Washington, D. C., October 25, 1966.

Frank W. McCulloch, Chairman
John H. Fanning, Member
Howard Jenkins, Jr., Member
National Labor Relations Board

(Seal)

TRIAL EXAMINER'S DECISION.

Statement of the Case.

On the basis of charges filed June 29, 1965, July 26, 1965, and September 13, 1965, by Local 236, United Furniture Workers of America, AFL-CIO, referred to herein as the Union, the General Counsel issued a consolidated complaint against Respondent, Louisville Chair Company, Inc. The complaint alleges that Respondent violated Sections 8(a) (1), (3), and (5) of the Act. Respondent's answer denies the commission of any unfair labor practices.

This proceeding, with all parties represented, was heard before the undersigned Trial Examiner in Louisville, Kentucky, on November 16 through 19 and December 14 and 15, 1965. At the close of the hearing the parties waived oral argument and were given leave to file briefs. Briefs were received from the Union and the Respondent.

Upon the entire record in this case, I make the following:

Findings and Conclusions.

I. The business of the Respondent.

Respondent is a Kentucky corporation with its principal office and plant located in Louisville, Kentucky, where it is engaged in the manufacture and sale of dinette sets. It also operates a fleet of over-the-road trucks for delivery of its products. During the 12 months prior to issuance of the complaint, a representative period, Respondent had a direct outflow of its products in interstate commerce valued in excess of $50,000, which it sold and shipped from its plant in Louisville, Kentucky, directly to points outside the State of Kentucky. At all times material herein, Respondent is, and has been, an employer engaged in commerce and operations affecting commerce within the meaning of the Act, and assertion of jurisdiction is warranted.

II. The labor orgnaization involved.

Local 236, United Furniture Workers of America, AFL-CIO, is an organization in which employees participate and which exists for the purpose in whole or in part of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment and conditions of work. I find that it is a labor organization within the meaning of Section 2(5) of the Act.

III. The alleged unfair labor practices.

A. Introduction and the issues.

During the winter and spring of 1965, the Union engaged in an organizational campaign among Respondent's approximately 300 production and maintenance employees.[1] Upon a petition filed by the Union in Case No. 9-RC-6223, an election was conducted on May 27, 1965, which resulted in a vote of a majority of the employees in the unit in favor of the Union. As set forth in greater detail below, Respondent filed objections to the election, and thereafter the Regional Director for the Ninth Region issued a Supplemental Decision overruling the objections and certifying the Union as representative of the employees on July 16, 1965. Respondent filed with the Board a request for review of the Regional Director's decision, which was denied.

The issues raised by the complaint are:

(1) Whether between January and July, 1965, Respondent violated Section 8(a)(1) of the Act by interrogation of employees concerning union activities, threats of reprisal,

[1]A prior effort by the Union to organize Respondent's production and maintenance employees in 1962 and 1963 ultimately resulted in a vote against representation, after an initial election in which the employees voted for representation was set aside. A complaint against Respondent alleging certain labor practices in connection with the earlier organizational campaign was dismissed, and the Union's objections to the second election held in 1963 were overruled. Louisville Chair Company, Inc., 146 NLRB 1380.

and solicitation of an employee to create trouble with pro-union employees so as to make possible their discharges.

(2) Whether on or about May 27, 1965, the day of the election, Respondent discharged Wayne G. Hale because of his activities on behalf of and sympathy for the Union.

(3) Whether on or about July 12, 1965, Respondent refused to employ Joseph E. Sweet because of past union affiliation and suspected sympathy for the Union.

(4) Whether on or about July 16, 1965, and thereafter Respondent refused to bargain with the Union in violation of Section 8(a)(5) of the Act.

(5) Whether a strike of Respondent's production and maintenance employees which commenced on August 17 is an unfair labor practice strike.

B. The alleged violations of Section 8(a)(1)

1. Superintendent Wedding

a. Joseph H. Wedding is the general superintendent of Respondent's manufacturing and trucking operations. Through foremen who report directly to him, Wedding supervises Respondent's day to day operations. Wedding also participates in collective bargaining negotiations with representatives of Respondent's employees and other matters concerning the representation of employees.

Sometime in January, 1965, Wedding received a copy of a letter from the Union to the Ninth Regional Office of the Board with a list of signatures of 25 employees attached. The letter stated that the named employees had joined an organizing committee for Respondent's employees and indicated that its purpose was to leave no doubt of the participation of the named employees in union activities. Among the signatures on the list was that of Kenneth Y. Skaggs. Within a few days after receiving this letter, Wedding called Skaggs into his office. In the course of a conversation with Skaggs, Wedding told him he was amazed that Skaggs was engaged in union activities in view of the

length of time he had been employed by Respondent. Wedding asked Skaggs what was wrong in the welding department where Skaggs was employed. Wedding commented that he had the feeling that the department foreman was not treating the employees right and asked Skaggs if he liked the foreman. Skaggs replied that he liked the foreman well enough but that some of the others did not. Wedding asked the reasons, and Skaggs replied that the employees thought they, rather than the foreman, should turn in their own count on piece work. Wedding explained that the count had to be checked by the foreman. Wedding then called Skaggs' attention to the letter and list of names he had received from the Union. Wedding told Skaggs that he could pass out all the Union authorization cards he wanted to and get them signed before the start of work and at break and lunch time, but that if Wedding saw him sign up any employees on Company time, Wedding would fire him, adding that he would not pay Skaggs to sign up union cards on Company time. Wedding told Skaggs to convey this message to the others whose names were on the list. Skaggs said he would comply and the conversation ended. Wedding, testified, without contradiction, that before talking to Skaggs he had reports that Skaggs was trying to get cards signed on Company time. Although Skaggs denied that he had done so, Skaggs testified that Wedding so charged in his conversation with him.[2]

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[2]There is only one material conflict between the testimony of Wedding and Skaggs with respect to this incident. According to Skaggs, Wedding threatened that employees would be discharged for having cards signed on Company time or property. Wedding testified that his warning applied only to Company time and that he specifically affirmed the right of employees to solicit signatures on their own time. In the light of Skaggs' failure to mention in statements previously given to the General Counsel that he was warned not to obtain signatures on Company property, his unconvincing explanation therefor, and Skaggs' admission that following this conversation he openly continued to solicit signatures on his own time on Company property, I do not credit Skaggs where his testimony is in conflict with that of Wedding.

The complaint alleges that Wedding's remarks to Skaggs constituted unlawful interrogation about Skaggs' union activities and those of other employees. Interrogation violates the Act "if the questioning takes place under circumstances which impart to it a tendency to interfere with the free exercise of rights under the Act."[3] No single set of factors is determinative, but more is required then a mere showing that an employer representative has questioned an employee concerning matters relating to union activity. It appears that Wedding's conversation with Skaggs was prompted by the report that Skaggs was soliciting signatures on union authorization cards during working hours, and that at least one of its purposes was to inform Skaggs, and through him the other employees whose names were on the list sent to Wedding, that they were not permitted to solicit signatures on Company time. It is true that Wedding in this interview expressed surprise at Skaggs' participation in the organizing campaign and briefly explored possible sources of dissatisfaction in Skaggs' department. However, Skaggs' identity as a union adherent had been brought to Wedding's attention by the Union, and Wedding made no effort in this conversation to dissuade Skaggs from supporting the Union. Wedding did not threaten Skaggs with any adverse consequences for continued activity, other than his permissible warning against solicitation on Company time which was accompanied by a statement that Skaggs was free to continue solicitation on his own time. Except for the incident involving Foreman Pry discussed below, which does not appear to have been part of any systematic plan of interrogation, there is no other evidence of interrogation involving any of Respondent's 300 employees during the 5 months which followed between Wedding's conversation with Skaggs and

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[3]Murray Ohio Manufacturing Company, 155 NLRB No. 28, at p. 2.

the representation election. I am not persuaded that the circumstances surrounding Wedding's questions to Skaggs concerning possible sources of dissatisfaction in the welding department imparted to this conversation a tendency to interfere with protected rights.[4] I conclude therefore that the allegation of the complaint based on this conversation should be dismissed.

b. On May 24, three days before the representation election, James Keeling, a foreman reported to Superintendent Wedding that he had observed Saul Spencer, an employee in his department, showing some union buttons to other employees during working hours. Keeling asked what he should do about it. Wedding replied that he would take care of the matter. The following day Wedding went to Spencer's department and stood for about 10 minutes on a landing 10 feet behind Spencer's work station where he could observe Spencer, apparently without being seen. While there, he observed Spencer showing a union button, which Spencer was wearing, to Green, a deaf mute employee who worked beside him.[5] Wedding heard Spencer say something to Green which sounded like, "You should be wearing one of these." Wedding estimated that the incident did not take more than 15 or 20 seconds. The incident occurred during working time. Green continued to work. Spencer, whose job was to turn sewn chair back covers inside out and to sort them, paused in his work while showing the button to Green and talking to him.[6] Wedding approached Spencer. Wedding told Spencer if he would spend more time on his work and less on union activity,

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[4]See Bernel Foam Products Co. Inc., 146 NLRB 1277, 1278, 1294.

[5]According to Wedding, Green reads lips fairly well.

[6]The above findings are based on the testimony of Wedding. Spencer testified that the pin on the button became unfastened and that he paused only to refasten it without saying anything to Green. For reasons set forth below, I have credited Wedding with respect to this incident.

they would get along a lot better and warned Spencer that if he was caught passing out union buttons or literature on Company time, Wedding would discharge him.[7] Wedding then went to Keeling and in Spencer's presence told Keeling to let him know if Spencer engaged in any union activity whatsoever on Company time.[8]

In connection with this incident, Wedding testified on cross-examination as follows:

> Q. Was it unusual for an employee regardless of what he does now to take a five second interval between turning backs occasionally?
>
> A. It would be very unusual for an employee to take five seconds out to engage in Union activity.
>
> Q. That's not my question, Mr. Wedding.
>
> A. If an employee took five seconds out just to stop for five seconds I wouldn't say anything to him, but if he's engaged in Union activity he's going to get it.
>
> Q. What if he took ten seconds out just to stop?
>
> A. I wouldn't say anything about that.
>
> Q. How about twenty, how about a minute?
>
> A. No. If he's engaged in Union activity he would.
>
> Q. But if he was engaging in Union activity you would toss him right out of the joint?
>
> A. I might, it all depends. I have warned them, I warn them usually my procedure would be to warn them as in the case with Saul Spencer.

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[7]Spencer conceded that Wedding warned him not to pass out buttons on Company time.

[8]Spencer testified that Wedding told Keeling that he wanted Spencer's "ass out of here for the least little thing" and that before talking to Keeling Wedding made a similar remark directly to Spencer. Keeling testified that Wedding told Keeling to notify Wedding if Keeling caught Spencer showing union buttons any time during working hours.

Wedding testified further that Spencer could talk all day on his job and do it efficiently and that Wedding would have no objection to an employee's talking all day if he did his work, but that he would not permit talking about the Union during working hours and so instructed his foremen.

Although Wedding in his initial responses to questions about the distinction he drew between union activity on the job and other work interruptions displayed a tendency to spar with counsel, his answers quoted above were basically candid. Spencer's demeanor on the other hand did not inspire confidence in his testimony and his limited ability to express himself, like that of other of the employee witnesses, though not a matter for which Spencer is to be censured, nonetheless raises a question as to the accuracy of statements attributed by Spencer to Wedding. I have concluded that Wedding is to be credited as to this incident.

Based on this incident, the complaint alleges that Wedding threatened Spencer with discharge for union activity in violation of Section 8(a)(1) of the Act. In Walton Manufacturing Company, 126 NLRB 697, 698 enfd. 289 F. 2d 177 (C.A. 5), the Board attached a presumption of validity to the enforcement of a rule barring union activity during working time "in the absence of evidence that the rule was unfairly applied." As the Board's subsequent decision in The Wm. H. Block Company makes clear,[9] the test of unfairness is whether the rule is enforced to prohibit union related activities during working time comparable to other work disrupting activities which are permitted during working time. In Block, the Board found that a no-solicitation rule was unfairly enforced when employees, with knowledge and participation of supervisory personnel, were permitted during working time to solicit

[9] 150 NLRB No. 30, at p. 3.

for gambling pools, to sell tickets to various events, and to collect money for gifts. Here, the only evidence with respect to the rule communicated to employees is in Wedding's statement to Skaggs in connection with the incident set forth in paragraph a. above. The complaint does not allege that Respondent's no-solicitation rule was itself invalid. However, as Wedding's testimony quoted above makes clear, Respondent tolerated short pauses by employees in the course of their work,[10] unless for the purpose of engaging in union activity. Likewise, Wedding considered employees free generally to talk while they worked, as long as they worked efficiently, but would not permit talking about the Union during working hours and so informed his foremen. Thus the vice in Spencer's conduct which prompted Wedding to warn him was not that he briefly interrupted his work or talked while on the job, but that the interruption and his talking were utilized for union activity. Wedding's warning to Spencer in the context of the conduct of Spencer which prompted it, and particularily in the context of his instruction to Keeling to report to Wedding if Spencer engaged in any union activity whatsoever on Company time, threatened Spencer with discharge for repetition of the incident Wedding had just observed or any union activity on Company time. As Wedding's threat unfairly enforced Respondent's no-solicitation rule, it constituted unlawful interference with employee rights and violated Section 8(a)(1) of the Act.

c. According to employee Spencer, on July 21, the morning after a well advertised union meeting attended by a large number of employees, Wedding came through the department "hollering that these people got their union suits" last night and that he had news that they would be

[10]There is no evidence that Spencer had paused excessively in performance of his work in relation to standards generally applicable to other employees.

made out of the best satin.[11] Spencer testified that Wedding then went to foreman Keeling, asked Keeling with reference to Spencer, "that boy there is a Union man, isn't he?", Keeling replied that he believed so, and Wedding then approached Spencer and asked "did you get your union suit last night?" According to Spencer, he replied that he did not and Wedding asked why not. Spencer testified that when Spencer replied that he didn't know, Wedding said, "[W]ell I am giving you one of the best sets made and I said yes sir. He said does the Union know how to make dinette sets and I replied I do not know. He said well they sure and hell and damn better know how to make them."

Wedding denied that he talked to Spencer at all about union suits or union activity on or about July 21, but testified that around that time he stopped to talk to a group of sewing machine operators and asked them if they had gotten their union suits yet, adding that he understood they were making them with two buttons on the flap instead of one like they used to. According to Wedding everyone laughed, and he left the department without talking to Keeling or Spencer. Wedding also testified that on a different occasion prior to the election he had asked Stone, an elevator operator, in the presence of several other employees, but not Spencer, if Stone thought the Union organizers knew anything about making dinette sets. When Stone said he did not know, Wedding added that they had better start learning something about it.[12]

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[11]The transcript at p. 108, line 6, in connection with this remark should be corrected to replace the word "Saturday" with "of satin." Spencer testified on cross-examination that this remark was directed at one of the girls in the department, that some of them laughed when he said it, and that Wedding sometimes joked with others in the department.

[12]Keeling testified that he did not hear Wedding make any remarks about union suits in his department and denied the occurrence of the portion of the incident which Spencer described as involving Keeling.

With respect to this incident, I was again favorably impressed by the candor of Wedding and credit his testimony. For reasons similar to those set forth above in connection with the May 25 incident, I do not credit Spencer. Accordingly, I conclude that the allegation of the complaint based on this incident, that Wedding unlawfully interrogated Spencer on or about July 21, 1965, should be dismissed.

2. Floor lady Whitham.

a. Floor lady Nora Catherine Whitham supervises 75 to 80 employees in the second floor upholstering department of Respondent's plant. On May 25, 1965, 2 days before the election, employee Roy Lee Gray went to Superintendent Wedding's office to complain that Joseph Paul Wright, a fellow employee had used vulgar language in front of Gray's wife, who was also an employee and at the time worked beside Gray. Wedding told Mrs. Whitham, who was present in Wedding's office, that he wanted Wright's use of vulgar language stopped.

Later in the day, as Gray was returning from lunch, he passed Mrs. Whitham's desk. She stopped Gray and told him she knew that Joseph Paul Wright and his brother, Thomas Wright, used bad language in front of his wife and that she had warned them about it. She also told Gray that it was bad for man and wife to work together and that something would have to be done about that. According to Gray, Mrs. Whitham continued to talk to him, bringing up the matter of a handbill that the Union had put out which reproduced the check stubs of some employees of another employer. Gray testified that after stating that the checks were those of the highest paid employees at the plant mentioned, Mrs. Whitham told him that if the Union was voted in at Respondent's plant and took the employees out on strike, they could be replaced "and also if the Union is voted in our profit-sharing plan will probably be cut out."

On cross-examination Gray testified that Mrs. Whitham said "If the Union is voted in it will probably cut our profit-sharing plan out." Gray testified that he did not take her statement to mean that the Union would probably cut it out and further restated what she had said as "If the Union was voted in our profit-sharing plan could be cut out." Gray restated the remark a final time in much the same words as his initial testimony.

Mrs. Whitham testified that she recalled speaking to Gray about Wright's use of vulgar language in front of Gray's wife, but denied discussing the Union handbill with Gray. Although Mrs. Whitham's testimony was not persuasive,[13] it is impossible to conclude from Gray's testimony which of his differing versions of the statement concerning the profit-sharing plan is correct, or indeed whether any one of these versions should be found to have occurred rather than a mere statement of the effects a strike would have on profits and the profit-sharing plan in view of the context in which Gray testified that the remark was made. In these circumstances, the evidence is insufficient to establish that Mrs. Whitham threatened elimination of the profit-sharing plan if the employees voted for the Union, and I conclude that the allegations of the complaint based on this incident should be dismissed.

b. Employee Paul Tobergta testified that about 2 weeks before the election, while at work, Mrs. Whitham called him over to her desk and asked him "just how Harold and David Marion and two other employees had ever gone to a union meeting and I told her I don't know." Tobergta further testified that the question which Mrs. Whitham asked was "if Harold and David Marion and two other employees had

[13]Mrs. Whitham's testimony was at times guarded and defensive, her memory in many respects appeared uncertain, and at times it appeared that Mrs. Whitham was distracted in her efforts to recall events of the critical period, perhaps understandably because of the recent loss of her husband.

ever gone to the union meeting." He testified that Mrs. Whitham did not name the two other employees, although Tobergta indicated that he knew who they were. Tobergta has a hearing defect and had difficulty hearing the questions asked him at the hearing. It is difficult to make sense of his testimony that he was asked about the Marions and two unnamed employees but knew who the unnamed employees were without their names having been mentioned. Tobergta's affidavit given to the General Counsel during the investigation of the case states, "She asked me if Harold and David Marion, two other employees, had ever gone to any union meeting."[14] However, Tobergta in his testimony at the hearing did not state at any time that the question concerned only the Marions, who were two other employees, as the statement suggests. Efforts to obtain clarification of Tobergta's testimony were unproductive. In view of the nature of his testimony, the conflict between his testimony and his written statement, and bearing in mind that his hearing impairment may have affected his understanding of what Mrs. Whitham said to him as well as his difficulty in grasping questions put to him at the hearing, I cannot accept his testimony as establishing that Mrs. Whitham questioned him about the attendance at union meetings of other employees.[15] Accordingly, I conclude that the allegation of the complaint based on this incident should be dismissed.

c. Employee Thomas Wright testified that about a week before the election, Mrs. Whitham called him to her desk and asked if he knew who was for the Union. According to Wright, when he replied that he did not know, Mrs. Whitham told him to go around and find out "Who

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[14]In this connection the transcript at page 133, line 22, was corrected by stipulation at page 816.

[15]Mrs. Whitham denied questioning Tobergta about the attendance at union meetings of Harold and David Marion or any other employees.

was for the Union and then to start a fight with them and get the Union sons-of-bitches out of there before the election." According to Wright, at the very end of the conversation, during its last few seconds, Superintendent Wedding walked up and "said it would be a good idea . . . What we was talking about."[16]

Wright testified also that 2 days before the election, Mrs. Whitham told him that employee Roy Lee Gray had called his brother, Joseph Paul Wright, "a son of a bitch and so she was telling me about it and she said if she was me to go back and poke him in the head for calling my brother a son of a bitch." According to Wright, she added, "If it was her brother [and] somebody called him a son of a bitch she would whip him," and Wright replied, "it wasn't my fight and I didn't want any trouble with anyone."

A few days before the election Wright wore a paper badge identifying him as against the Union. About a week after the election Wright attended a Union meeting. According to Wright, the next morning, in the presence of his helper,[17] Mrs. Whitham told Wright, "I knew you was at a Union meeting last night and you ain't no good, you or any of the rest of you Union son of a bitches and if I catch you buying saltines or candy during work hours, you are automatically fired."[18]

On June 30, approximately a month later, Wright was discharge for smoking in the rest room. The amended charge in Case No. 9-CA-3627 alleged that Wright was dis-

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[16]According to Wright this conversation lasted about 4 minutes, during it Mrs. Whitham named no particular people or department where she wanted him to start trouble, and he understood that he was to pick a fight with anyone who was for the Union.

[17]Wright's helper was not called as a witness at the hearing.

[18]According to Wright's testimony there was no rule against employees buying soft drinks during working hours except when the Union drives were going on. In his statement given to the General Counsel, Wright stated that there was a standing rule to that effect and the Company got strict about it when Union drives were in progress.

charged because of his union activities. On August 2, 1965, the Union requested withdrawal of the portion of the charge based on Wright's discharge, and on August 9 the Regional Director approved the withdrawal.

Apart from the above, Wright testified that he knew the Union was handing out handbills for some time before the election but he knew nothing about the Union getting cards signed until a week before the election. Wright testified that before that there weren't any cards being passed around, there wasn't anybody talking about the Union, and he didn't know anything about it. Despite Wright's inability to read, he testified that his wife read to him letters passed out by the Company which mentioned the union activities and efforts to get cards signed.

Mrs. Whitham denied that either of the pre-election incidents occurred. According to Mrs. Whitham during the month before the election Wright did not talk to anyone other than to say good morning and ask for work. As she put it, after the Union activities began, he took kind of a "spell" and had done so before. Wedding also denied the participation in the first incident which Wright attributed to him.

As for the post-election incident, Mrs. Whitham testified that she did not speak separately to Wright about buying soft drinks during working hours, but that she called all employees in her department on one occasion approximately 3 months before the election and told them that the break times were provided so that employees could get something to eat or drink. She testified she then told them that during working time employees were not supposed to go to the soft drink machines and that there were signs posted in the plant to that effect.

I do not credit Wright as to any of these incidents. Wright was admittedly a disgruntled ex-employee. His denials of knowledge of Union activity in the plant were not convincing. While the incidents he described are not

so implausible that one can say with assurance that they could not have happened under any circumstances, the suggestion that a supervisor of some years experience on two occasions urged a tall, strong employee to start fights at random in the plant is certainly such as to engender skepticism. The absence of other witnesses to these incidents could understandably make direct corroboration impossible, but the absence of any surrounding circumstances to supply indirect corroboration to Wright's testimony is a more serious matter. Despite Mrs. Whitham's asserted statement of desire to get rid of union adherents before the election, the record before me shows no evidence that any union adherents were removed before the election by the means allegedly suggested to Wright or any other. While Wright's illiteracy does not detract from his credibility, his limited ability to express himself, which the cold record does not fully reflect, raises considerable doubt as to his accuracy as a reporter of what others said to him. Wright was unable to give a convincing description of the circumstances surrounding the first incident, supplying at most 30 seconds worth of conversation to describe a conversation which he estimated as lasting several minutes. If his version were accepted, it would be difficult to understand how Wedding had an opportunity to hear what Mrs. Whitham proposed let alone to endorse it. With respect to the third incident, Wright's credibility depends heavily on his testimony, not entirely clear, that the rule against drinking soft drinks during working time only existed during union drives. His testimony is in conflict with his statement and Skaggs as well as Wedding and Mrs. Whitham.

Accordingly, I conclude that Wright is not to be credited, and none of the allegations of the complaint based on Mrs. Whitham's conduct involving Wright have been sustained.

3. Foreman Pry

A single incident is attributed to foreman Pry, based on testimony of employees Joseph Vittitow and Wayne G. Hale.[19] Until Vittitow left Respondent's employ in March 1965, he and Hale worked together in the receiving department. They transported materials from the receiving dock throughout the plant. Their duties frequently brought them into Pry's department, where they frequently spoke to Pry and laughed and joked with him.

On one occasion, during February or March,[20] after Pry had been talking with Vittitow and Hale for several minutes, Pry asked Vittitow how the union meeting had gone the night before.[21] Vittitow replied that it had gone all right but that he didn't see anything of Pry or his spies there. Pry retorted that "his spies were smart for staying out of the union and he said anybody involved in the union would definitely be fired."[22] According to Vittitow, he was

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[19]Pry was not called as a witness.

[20]Vittitow placed the conversation during the last week in February. Hale in a statement given to the Board in July placed the conversation in March or April. In his testimony he first placed the incident in February, and after confronted with his statement testified that he was not sure of the month.

[21]Vittitow testified initially that Pry walked up and asked how the union meeting went. On cross-examination he testified that they had been talking for several minutes when Pry asked about the union meeting.

[22]The above version is that of Vittitow. Hale testified that Pry asked Vittitow "how the union had been going last night," and that Vittitow replied "Okay" and "he didn't see any of your spies there." According to Hale, Pry then said that "His spies were too smart to get caught" and that "we would be fired if we kept on screwing around with the union." In his written statement Hale stated that before Pry mentioned discharge, there had been a lot of conversation between Vittitow and Pry about the Union, but that he did not recall what was said. Hale's explanation as to the omission of the statements which preceded the alleged threat from his signed statement was not convincing. Standing alone, I would be reluctant to credit Hale's version of this incident, in view of the obvious weakness of his memory. However, with re-

(Footnote continued on following page)

joking when he mentioned Pry's spies, but Pry was serious in his reply. Vittitow had told Pry he was for the Union, but Hale had not at that time openly indicated support for the Union.

The complaint alleges that Pry interrogated and threatened Vittitow in the presence of Hale in violation of Section 8(a)(1) of the Act. It appears that the conversation between Pry and Vittitow, at least at the outset, was carried on in a bantering tone and was similar to other conversations which regularly occurred between them. Insofar as the record shows, the matter of the Union was first raised by Pry, when he asked Vittitow, a known Union supporter, how the union meeting had gone the night before. Vittitow's reply was flippant and sarcastic. Had the conversation terminated at this point, I would be inclined to agree with Respondent that Pry's insolated inquiry might be dismissed as harmless. However, whether provoked by the implied accusation in Vittitow's reply, moved by the desire to best Vittitow in their verbal exchange, or otherwise motivated, Pry did not let the matter rest, but retorted with a threat that those who were involved with the Union would be fired. There is no evidence that Pry tempered his remark either by additional comment or manner of delivery to make clear that the threat was not seriously intended and the credible evidence establishes that Vittitow viewed Pry's reply as serious. The test is not whether Pry's statements had coercive intent or effect but whether his conduct may be reasonably said to tend to interfere with the free exercise of employee rights under the Act. Time-O-Matic, Inc. v. N.L.R.B., 264 F. 2d 96, 99 (C.A. 7). A threat that employees will be discharged for involvement in union activities is the most obvious form of interference with the

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spect to what I regard the critical portion of Vittitow's testimony, the threat that those involved in the Union would be discharged, Hale's testimony supplies some corroboration, and in the absence of any denial, I credit Vittitow with respect to this incident.

exercise of protected rights. Accordingly, I conclude that Pry's threat to Vittitow, in the presence of Hale, violated Section 8(a)(1) of the Act.

C. The alleged violations of Section 8(a)(3).

1. The discharge of Hale.

Mrs. Jeanette Napier, also known to Respondent's employees as "Tootsie," was employed as a checker in Respondent's upholstery department under the supervision of Mrs. Whitham. On the day before the election, Mrs. Napier and a number of other girls in her department wore homemade circular cardboard insignia identifying them as opposed to the Union. On the day of the election, May 27, Mrs. Napier and a number of other girls in the department wore white headbands on which hand inscribed legends appeared. Most of the hats had pictures of donkeys on them. The hat worn by Mrs. Napier at the time of the criticial events had a picture of a horse drawn on it and bore the legend "Don't be a horse's blank. Vote No." The bands also had feathers sticking up from them in the rear. On the day of the election at all times material Mrs. Napier also displayed a piece of white paper about 6 by 8 inches which had a picture of a piano drawn on it and bore the legend "Play for Joe" (referring to superintendent Wedding) or words to that effect. The paper was pinned to the bottom of the back of Mrs. Napier's blouse which she wore hanging loose and the paper hung down from that point.

At about 1 p.m. Mrs. Napier and the other girls in her department, which was located on the second floor of the plant, went to vote at the polls which were located on the first floor of the plant. On her way back to work after voting, Mrs. Napier, following several other girls from her department, passed the door to the receiving department where Wayne Hale worked. Hale was standing 2 or 3 feet

inside the door leaning against a small table. Mr. Clark, a customer since deceased, was standing in the hall as Mrs. Napier approached. Clark looked at Mrs. Napier and laughed, asking her "What way did you really vote?" Mrs. Napier laughed in response. At that point Hale called out to Mrs. Napier, "I would like to kick you in your God-damned big fat ass." Mrs. Napier turned toward Hale and said, "If you have got the guts, go ahead." Hale took a step or two towards the door and invited her to come into the receiving department. Mrs. Napier replied that she would meet Hale halfway. Mrs. Napier then turned and left to go upstairs to her work station.[23] Clark remained at the scene until Mrs. Napier left and followed her up the stairs until she turned down the aisle to her work station. Clark continued on to another portion of the second floor where he had business.[24]

When Mrs. Napier reached her work station, she saw Wedding standing outside his office door with Mrs. Whitham and two of the girls who had been walking in front of her on the way back from the polls. The girls, at least one of whom was wearing a headband similar to Mrs. Napier's, had reported to Wedding immediately on their return that there was a disturbance between Mrs. Napier and Hale downstairs. When Mrs. Napier walked into the department, Wedding motioned to her to come to him, and she did. Wedding asked her what the trouble was downstairs. Mrs. Napier told Wedding that Hale, whom she identified as the red-headed boy in the receiving department downstairs, had told her "he would like to kick me

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[23]Mrs. Napier testified that the incident lasted only as long as required to say the words which passed between her and Hale.

[24]The above version of the incident is based on Mrs. Napier's testimony. Hale's version differed only slightly in its essential respects. Because Hale's testimony concerning the circumstances which led to the incident raises substantial doubt as to the accuracy of Hale's recollection, I have credited Mrs. Napier where their testimony is in conflict.

in my God-damned big fat ass."[25] Wedding stated that he could not put up with that and left, proceeding to the receiving department.

Wedding approached Hale and asked him if he said "that" to "Tootsie" without repeating the remark. Hale replied that he had said it and meant it.[26] Wedding told Hale he would give him his money, took him to have his check made out, gave it to him, and told him to leave and not return.

No statement setting forth the reasons for Hale's discharge was given to Hale at the time of the discharge. However, Wedding testified at the hearing that Hale was discharged for using vulgar language to a female employee and in front of a customer.[27] Hale was disqualified for unemployment compensation on the basis of findings that he was discharged "for making vulgar and insulting remarks to women employees" and "for misconduct connected with work." Hale did not appeal from this determination.

As I view the issues raised by Hale's discharge, the salient feature is that Hale's remark, which caused his discharge, was itself inextricable from his union activities. Mrs. Napier forcefully and provocatively displayed her

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[25]Wedding testified initially that Mrs. Napier told Wedding that Hale threatened to kick her. However, Wedding subsequently testified as found, consistent with the testimony of Mrs. Napier. Mrs. Napier testified at one point that she also told Wedding at this time the remaining words which passed between her and Hale. However, she twice testified that the above statement was all that she said to Wedding, consistent with Wedding's testimony. I so find.

[26]Hale initially testified that he told Wedding that he had said it but was only kidding. However, when asked specifically whether he had told Wedding he meant it, Hale replied that he didn't know, that he didn't think so, and did not deny saying he meant it. I credit Wedding.

[27]It may be questioned whether the second ground existed at the time of the discharge, in view of the rapidity of the events, the fact that Mrs. Napier did not mention Clark's presence to Wedding, and Wedding did not talk to Clark about the incident until after the discharge.

anti-union sympathies wherever she appeared on the day of the election, as is clear from the nature of her insignia, the location of the sheet of paper pinned to the back of her blouse, and the laughter and remark they evoked from Clark, a customer without direct personal interest. It should have been evident that to employees supporting the Union, Mrs. Napier's insignia would be more likely to provoke anger than mirth, as she herself realized when she testified, "I don't know what they [referring to Hale] seen, the sign or what made them say it, or not."

Indeed absent any other evidence of cause for Hale's outburst, the direct correspondence between the anatomical analogy suggested by the legend on Mrs. Napier's hat and Hale's remark made it obvious that Hale's remark, however crude, was a response to Mrs. Napier derisive solicitation of votes against the Union.

Although I have generally found Wedding to be credible and candid in testifying as to the events concerning this and other incidents, he displayed a significant lack of candor in testifying as to his awareness of the insignia worn by Mrs. Napier. Wedding testified that he did not see what was written on Mrs. Napier's hat because the insignia was on the back end. However, he conceded that he had seen others wearing similar headbands around her department and had noticed a horse or something drawn on the back of one. He also testified,

> "There was a lot of people wearing hats and buttons around there and I have no idea how they voted over there in that election and apparently I was fooled by a lot of them that I thought might be for the Company when they really weren't."

Wedding after initially testifying that he had no idea whether Mrs. Napier was for the Union or the Company, conceded that he believed her to be for the Company but did not know it for a fact. When asked if the only people

wearing similar headbands were against the Union, Wedding replied, "I never gave that any consideration."

In view of the remark which Mrs. Napier's appearance invoked from Clark, the fact that Wedding's office was located within beckoning distance from Mrs. Napier's work station, the fact that the headbands and other anti-union insignia were worn in the upholstery department on the day of the election and the previous day, the impression Wedding generally created as a quick, observant, and not aloof plant superintendent with a strong interest in the outcome of the election, and the defensive and at times evasive nature of his testimony in this regard, I do not credit Wedding's disclaimer of knowledge of the slogan on Mrs. Napier's headband. Moreover, in the light of group leader Stevenson's testimony that only 1 hour before the election, Hale put on a Union button, [28] and my findings above which cast discredit upon Wedding's testimony insofar as it pertains to the state of his knowledge, as well as the nature of the incident which caused Hale's discharge and its timing in relation to the election, I do not credit Wedding's testimony that he had no knowledge or belief as to Hale's support of the Union at the time of the discharge.

In these circumstances, the question to be decided is whether Hale's remark was such as to deny him the protection the Act would otherwise afford him in responding to Mrs. Napier's campaign insignia.

The test applicable to a case such as this is whether an employee in the course of concerted activity "engaged in such flagrant, violent, serious, or extreme misconduct as to render [him] unfit for further service."[29] In judging verbal misconduct, the Board there held with reference to offensive cartoons:

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[28] Of the witnesses who testified as to Hale's wearing of Union buttons in the plant, Stevenson had the least personal and emotional involvement, and I credit Stevenson.

[29] Indiana Gear Works, A Division of the Buehler Corporation, 156 NLRB No. 40, at p. 5, and cases cited therein.

> However, assuming arguendo, that the cartoon was offensive in character, we do not approve of vulgarity, but do not consider this to be of such a grievous nature as to make Packard unfit for further service. Such mode of expression must be viewed in the context in which it occurs. Thus, its use is not at all unusual in a work-a-day associations among industrial workers. Factory and foundry employees do not always employ the language used in polite formal society while at work. It is also a fact that tempers are aggravated and attitudes harden in the stress and strain of sensitive situations such as the one involved herein. Absolute restraint might be more desirable, but cannot be expected realistically.[30]

Here the context leaves no doubt that Hale's remark was not of such a character as to render him unfit for further service. It did not occur in isolation and without provocation. It came at the climax of a long Union organizing campaign when the stresses and strains inherent in such campaigns are at their peak. The conduct of Mrs. Napier which provoked Hale's remark was apparently deemed by no one as sufficient to raise any question of her fitness for further service. She and others in her department were permitted to wear the provocative hat band on the day of the election in Mrs. Whitham's department without any restraint. The use of vulgar language was admittedly tolerated in the plant,[31] and although Wedding distinguished between the use of such language in telling jokes or ad-

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[30]Indiana Gear Works, A Division of the Buehler Corporation, supra, at p. 6.

[31]Mrs. Whitham's testimony that she never heard such language used is not credited in view of Wedding's testimony as to its use, my impression generally with respect to her testimony described above, and her own earlier testimony that she told Gray a few days before the election, "You talk bad in front of [your wife] and the rest of the guys are standing right around and they can hear it too."

dressing machines and its use between employees, such a distinction is more easily stated than observed.[32] One does not use language in isolation but in communication with others. Hale's conduct was not violent nor did he threaten violence. In the remark reported to Wedding on which the discharge was based Hale told Mrs. Napier what he "would like" to do and not what he was going to do. It was Mrs. Napier who carried the matter forward in a portion of the incident not reported to Wedding before the discharge when she challenged Hale to follow through if he had the "guts." Hale even then put it to Mrs. Napier to make a further move if she wanted his wish translated into action. If any threat emerged in the incident, it was evoked by Mrs. Napier's response, was not reported to Wedding, and was not a reason for the discharge.

I conclude that Hale's choice of terms in which to voice his response to Mrs. Napier's insignia, while not to be condoned, was not so flagrant, violent, serious, or extreme as to deprive him of protection of the Act, and accordingly that his discharge violated Section 8(a)(1) of the Act. I find it unnecessary to decide whether Hale's discharge also violated Section 8(a)(3) of the Act, as the remedy in any event would be the same.[33]

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[32]In the incident a few days earlier when Wedding instructed Mrs. Whitham to tell Joseph Paul Wright to stop using bad language after Gray complained that Wright used vulgar language in addressing Gray in front of Mrs. Gray, it appears that Wedding's instruction, at least as reported by Mrs. Whitham who relayed it, covered all use of vulgar language, and did not draw such a distinction.

[33]In reaching this conclusion, I do not rely on an incident which occurred the day after the election in the welding department, with respect to which Skaggs and Wedding testified and which the General Counsel contended related to Hale's discharge. Although the relationship of this incident to the discharge is no more clear to me now than at the hearing, I would in any event credit Wedding and not Skaggs with respect to this incident.

2. The refusal to hire Sweet.

On July 12, 1965, Joseph E. Sweet applied for employment at Louisville Chair, having been referred by the State Employment Office as an applicant for an opening on Respondent's table line. Sweet had previously been employed by Huttig Sash & Door Company, Inc., and had been discharged by Huttig. Huttig's employees were represented by the Charging Party in this case, and Sweet had been the Union's chief steward at Huttig. Following his discharge, the Union filed charges against Huttig, and a complaint issued, alleging that Sweet had been unlawfully discharged for performance of his chief's steward's duties. Several weeks before Sweet applied for employment at Louisville Chair, the Trial Examiner in the Huttig case issued his Decision finding that Sweet's discharge violated the Act and recommending his reinstatement with back pay. On September 24, 1965, the Board adopted the Trial Examiner's Decision and recommended order with respect to Sweet.[34]

When Sweet arrived at Respondent's plant on July 12, he was directed to Jean Ohmann, the personnel director and plant nurse. Miss Ohmann interviews and hires all applicants for employment for unskilled jobs at Respondent's base rate.[35] Miss Ohmann gave Sweet an application form which Sweet filled out and returned to her. Sweet's application listed Huttig as his last employer, and $1.89 per hour as his earnings at the time he left Huttig. Under the heading on the form, "Why did you leave? Give details." Sweet wrote the single word "Discharge." In response to the question "What experience or training have you had

[34]Huttig Sash & Door Company, Inc., 154 NLRB No. 125.

[35]Included among those Miss Ohmann hires are employees who work on an individual or group incentive basis. Their actual earnings with bonuses may run considerably higher than the $1.25 base rate at which they are employed. The table line for which Sweet was referred receives group incentive pay.

which would help you in the position for which you are applying?" Sweet wrote, "None."

According to Sweet, after returning the application to Miss Ohmann, she looked it over and asked Sweet why he was discharged by Huttig, and Sweet replied that "we had Union problems, and I was fired." Sweet testified that Miss Ohmann asked him for further detail, and he replied that he was chief steward, was fulfilling his duties and was fired. Sweet testified further:

> "She put her hand to the side of her face, shook it back and forth and said she couldn't hire me because we are having Union problems here too. And she said if I was to hire you now I would be looking for a job myself in the morning. And therefore she said I have to look out for me and I said I can't blame you for that."

According to Sweet when he mentioned the reason he was fired, Miss Ohmann asked the identity of the union involved. He replied "AFL-CIO Local 236, and she said isn't that Local 236 and I said, Yes mamm—it was the same one that—correction. And she said that was the same one that was theirs, that we are having Union problems here too." Sweet testified that he did not discuss with Miss Ohmann either his previous wage rate or the rates paid by Respondent.[36]

In the blank on Sweet's application which called for a statement of the reasons Sweet left Huttig, in addition to the word "Discharge" in Sweet's hand, there also appears the notation, "Union steward lost election got fired" in the hand of Miss Ohmann.[37] Sweet denied that he mentioned

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[36]According to Sweet, he had been told at the employment office that the hiring rate at Respondent's plant was $1.25 an hour.

[37]The record does not establish when this notation was made although it is likely that it was made during the interview.

an election to Miss Ohmann or that he attributed his discharge to loss of an election.

Miss Ohmann testified that she had no recollection of her interview with Sweet or any other specific applicant mentioned during the hearing, and her recollection was not refreshed at the hearing. Miss Ohmann interviews from 5 to 30 or 40 applicants a day, practically every day, all of whom are referred by the State Employment Service. Her usual practice in conducting employment interviews is to ask applicants to fill out an application form. After the form is completed, she checks it over to make certain that all questions have been answered. If not, she asks the applicant to complete it or makes a notation herself on the basis of the information elicited in her interview. One of the items she checks is the reason given for a discharge or a quit, and if none appears on the application, she inquires as to the reason. She denied positively that she had ever told any applicant that she could not hire him because of union sympathy, affiliation or activity. According to Miss Ohmann, her usual practice, from which she was careful not to deviate, was not to question applicants about their union activities,[38] and both before and after the May 27 election, she had hired applicants whom she knew or believed to have been union members in previous employment.[39]

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[38]She testified that she was not instructed by Wedding or any one else with respect to questioning applicants about their union sympathies or activities.

[39]Miss Ohmann's testimony with respect to a list of 10 such employees, hired between January and August 1965, described by her as representative, indicates that her belief as to employee membership was based on her knowledge, understanding, or belief that the employees of employers for whom they previously had worked were represented by unions, but that she had no knowledge as to what unions represented the employees, what employees of these employers were represented, or whether or not they were subject to union security agreements requiring union membership as a con-

(Footnote continued on following page)

Miss Ohmann testified initially that her general instructions were to hire applicants who had previously earned $1.25 an hour or less. When first asked if she ever deviated from those instructions, she replied that there might be deviation in the event that the applicant had earned more money in earlier employment, but not in his most recent employment. She added that to the best of her recollection she had never deviated from the practice where an applicant had made as much as $1.89 an hour in his immediately previous employment.

Later, on cross-examination, Miss Ohmann testified that she was instructed not to hire employees who were making appreciably more than $1.25 an hour, and then added that if she were hiring employees for piece or bonus work she might hire employees who had previously earned $1.35 or $1.40 an hour, or possibly higher, giving as an example an older worker who had been making $1.50 an hour who applied for a bonus work job.

When recalled for further cross-examination following the adjournment in the hearing, Miss Ohmann denied that she had testified that she was instructed to hire employees who were previously paid less than $1,25 an hour, and again stated that she was instructed not to hire employees who made appreciably more than $1.25 an hour. As then explained further by Miss Ohmann, the determination as to what constituted earnings appreciably higher than $1.25 an hour depended upon the length of time since the applicant had received higher earnings, his age, the number and age of dependents, and whether, under the circumstances disclosed by the application, it appeared that he was so accustomed to receiving or in need of higher wages that he

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dition of employment. Miss Ohmann testified that in one instance in June 1965, she hired an applicant whose application indicated "was on strike" as the reason she left her prior employment in 1959, Miss Ohmann had no recollection of what she or the applicant said during the employment interview.

would not be a likely prospect to remain as a permanent employee.

Examination of the employment applications of those employees who Miss Ohmann identified as having previously worked for employers whose employees were represented by unions indicated that the exceptions were more substantial than Miss Ohmann's initial testimony would have indicated. Thus one employee whose prior earnings had been $525 a month and who had been unemployed for about the same length of time as Sweet was hired because her potential earnings at piece work with Respondent would be as much as $525 a month.[40] Two employees with prior earnings of $1.50 an hour were hired as assemblers on the table line where group bonuses gave them potential earnings of $1.50 an hour.[41] Another employee whose earnings in his last job were $60 a week and in his next to last job had been $296 a month, or the equivalent of $1.70 an hour for a 40 hour week, was hired at $1.25 an hour because probable overtime gave him a potential of $60 a week. One employee whose prior earnings had been $2.22 an hour was hired as a sewing machine operator at the specific direction of Wedding because of special circumstances.

The table line for which Sweet was referred was a group bonus job for which earnings with bonus averaged about $1.50 an hour.

The question presented with respect to Sweet is whether Respondent considered his application "in a lawful, nondiscriminatory manner" or failed to consider his application for employment "for reasons proscribed by the Act."[42]

The General Counsel's case rests upon the testimony of Sweet, summarized above, which, if credited, would sup-

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[40]Miss Ohmann testified that the piece work earnings of some operators ran as high as $30 to $35 a day.

[41]One of these employees had previously earned $250 a month, which is approximately the same as $1.50 an hour.

[42]Shawnee Industries, Inc., etc., 140 NLRB 1451, 1452-1453, enfd. in part, 333 F. 2d 221 (C.A. 10).

port the inference that Miss Ohmann in considering Sweet's application did not go beyond consideration of Sweet's union activity at his previous place of employment and rejected him for that reason.

The credibility issue posed is complicated by the fact that Respondent's attack on Sweet's credibility is more circumstantial than direct. Miss Ohmann, having no recollection of her interview with Sweet, could only rely on her own assessment of her practices and method of operation in stating that she was positive she did not make the statements which Sweet attributed to her. She based her certainty on the asserted fact that union considerations never entered into her determinations with respect to employment, that she never questioned applicants about union affiliation, that she hired applicants despite her belief that they had prior union affiliation, that she would have remembered the incident if she had made the statement attributed to her by Sweet as it would have been unusual, and that Sweet's application would have been denied as a matter of policy because of his rate of pay at Huttig.

In one respect at least it would appear that the Sweet interview was unusual by Miss Ohmann's standards. For while Sweet did not testify that Miss Ohmann asked him about his prior union activity, Sweet's union activities were nonetheless discussed in response to her routine question as to the reason for his discharge from Huttig. Moreover, Miss Ohmann's reliance on the fact that she never asked employees about union activity, despite the absence of any instructions to that effect, is beside the mark as no one contends that Miss Ohmann questioned Sweet about his union activities as such. The evidence with respect to the hiring of other employees who Miss Ohmann believed had union background is at best inconclusive. Miss Ohmann's beliefs were for the most part sketchily founded, went to the organization of the plants of applicants' previous employers

rather than to applicant's individual activities, and concerned unidentified unions rather than the charging union. Miss Ohmann's lack of recollection as to the details of her interviews with any of the applicants, including Mrs. Cslank whose application indicated that she left another employer six years earlier because she "was on strike" again unfortunately makes it impossible to know whether inquiry into Mrs. Cslank's reason for leaving during the interview disclosed further details as to Mrs. Cslank's union activity and participation in the strike. The extent of Miss Ohmann's knowledge in each of the cases cited rather clearly separates them from the case of Sweet who at the very least disclosed that he had been a chief steward and that his discharge was related to that fact and at most disclosed considerably more.

Of greater significance, however, Miss Ohmann's testimony as to her hiring practices, which ended on a weaker note than it began, does not persuade me that Sweet's rejection as an applicant was as certainly based on policy reasons as Miss Ohmann testified. As set forth above, in her initial testimony, Miss Ohmann drew a firm line and testified that she was instructed to hire only those applicants who had previously earned $1.25 an hour or less. After retreating from and then denying that she had taken this initial position, her testimony finally indicated that out of the relatively small number of applications examined in this proceeding, she had hired two employees who had made substantially more than $1.25 or even $1.89 an hour, one because potential incentive earnings with Respondent were high and one because Wedding asked her to do so for special reasons. The progression in Miss Ohmann's testimony casts substantial doubt upon the rigidity of the policy which she initially testified, without specific recollection, would have caused her to reject Sweet. More important, the sequence of her testimony in this regard also casts

doubt upon the general reliability of Miss Ohmann's assessment of what she may have said in the application of standard procedures in an employment interview of which she has no specific recollection, for her testimony in this respect pertained to a function which she regularly performed, and one would expect her to recall her practices in employing applicants more clearly than what may have been said in a particular interview. For all these reasons, I find that absent recollection of her interview with Sweet, the foundation for Miss Ohmann's positive denial of Sweet's testimony is weak.

On the other hand, Sweet's testimony contains little on its face to suggest that it was untruthful. To be sure, Sweet, as a former officer of Respondent and as the alleged discriminatee, has an interest in this proceeding as does Miss Ohmann by virtue of her position.[43] However, at least one detail in Sweet's testimony, that Miss Ohmann put her hand to her face and shook her head upon hearing the reason for Sweet's discharge from Huttig, indicates recollection of a total scene and not mere recitation of disembodied statements. Sweet did not impress me as one likely to have invented a detail of this kind. While Sweet testified that he identified his union only as Local 236, AFL-CIO, he also testified that Miss Ohmann indicated recognition that this was the same union which sought to represent Respondent's employees. Despite Miss Ohmann's denial that she knew what Local 236, AFL-CIO, was, I am inclined to believe that one in her position would have at least attached sufficient significance to the number 236 to have associated it with the Charging Party and to have

[43]There is no evidence to support Respondent's contention that Sweet was a "plant." Sweet had not been reinstated by Huttig when he applied for employment, and there is no evidence that he had expectation of reinstatement in the near future. He had a family to support and was referred to Respondent by the State Employment Service. There is no evidence before me to indicate that he was not seeking employment in good faith.

made the statement to that effect which Sweet attributed to her and which he did not deny or correct at the time.

In sum, on the evidence before me, I conclude that Sweet credibly testified with respect to his interview with Miss Ohmann. Whether Miss Ohmann genuinely does not recall the incident or resorted to a failure of memory as a convenient means to avoid facing up to herself or to her employer for her lapse, I find it unnecessary to decide, for after considerable reflection, I am convinced that her testimony is not sufficiently reliable to credit her denials of the incident absent specific recollection.

Under these circumstances, I conclude that Miss Ohmann failed to consider Sweet's application because of reasons proscribed by the Act and that Respondent therefore violated Section 8(a)(1) and (3) of the Act.

D. The alleged refusal to bargain.

Pursuant to the Decision and Direction of Election of the Regional Director in Case No. 9-RC-6223, an election was conducted in the following unit, found therein and herein to be appropriate:

> All production and maintenance employees employed by Respondent at its Louisville, Kentucky, plant, including all plant clerical employees, garage mechanics and their helpers, but excluding all truck drivers and spotters, all office clerical employees, guards, professional employees, and supervisors as defined in the Act.

The election resulted in a vote of 187 for and 112 against the Union, with 3 void ballots. Following the election Respondent filed timely Objections To Conduct Affecting The Results of the Election and Objections to the Conduct of the Election. Its objections to conduct affecting the results of the election were based on similar statements in two

handbills distributed by the Union which Respondent alleged were grossly and materially misleading and calculated by the Union to deceive and mislead Respondent's employees in order to induce them to vote for the Union. Its objections to the conduct of the election were based on the fact that upon counting the ballots after the election it was determined that 302 ballots were cast while only 300 names on the eligibility list were checked off by the observers to the election as having voted. Respondent contended that the integrity and secrecy of the ballot was not preserved and charged "that 'chain balloting' or 'chain voting' may have occurred in said election."

On July 16, 1965, the Regional Director for the Ninth Region issued his Supplemental Decision and Certification of Representative in Case No. 9-RC-6223 pursuant to Section 3(b) of the Act and Section 102.69 of the Board's Rules and Regulations. In it the Regional Director concluded that neither of Respondent's objections raised a substantial or material issue affecting the results of the election and that they should be overruled. Accordingly, pursuant to the authority delegated to him by the Act and the Board's Rules and Regulations, he certified the Union as representative of employees in the appropriate unit.

On July 19, 1965, on behalf of the Union, Charles McCormick, United Furniture Workers' Regional Director, wrote Respondent requesting Respondent to meet with the Union to negotiate a collective-bargaining agreement and suggesting a meeting date. On July 21, 1965, Respondent's Attorney responded that he had been instructed by Respondent to appeal the Regional Director's decision to the Board and that the Union's request was accordingly premature and declined.

Thereafter Respondent filed with the Board a timely Request for Review of the Regional Director's Supplemental Decision and Certification of Representative in which it

urged that the Regional Director's Supplemental Decision be overruled in its entirety and the election set aside or in the alternative that a hearing be held. Respondent subsequently filed with the Board a Supplemental Statement in support of its Request for Review.

On September 1, 1965, the Board by telegraphic order denied Respondent's Request for Review "as it raises no substantial issues warranting review."

On September 2, 1965, the Union by telegram to Respondent repeated its request for bargaining, and on September 4 Respondent's Attorney replied on its behalf by letter that Respondent did not agree with the Board's action and that he had been instructed to seek reconsideration and to carry the matter to the courts if the request for reconsideration were unsuccessful. The letter concluded that the request for a meeting was declined, as the only means to obtain judicial review afforded by the Act was through an unfair labor practice proceeding. On September 10, Respondent filed its Motion for Reconsideration of the Board's denial of its Request for Review reiterating its request for a hearing with particular reference to its objections to the conduct of the election. On October 19 by telegraphic order the Board denied the Motion for Reconsideration as raising no matter not previously considered, stating "The Board concluded that no substantial issues were raised warranting a hearing."

Respondent seeks in the instant proceeding to reraise one issue which it sought to litigate before the Regional Director and the Board prior to the election[44] and the two issues which it raised by its Objections to the election. At the hearing Respondent sought to introduce evidence relating to these issues, but on objection by the General Counsel the evidence was excluded, and Respondent was permitted

[44]This issue concerned the adequacy of the Union's showing of interest furnished in support of its petition.

to make offers of proof. I have carefully considered the offers of proof made by Respondent and find, as conceded by Respondent at the hearing, that the evidence thereby proffered is substantially the same as the matter set forth in Respondent's pleadings and affidavits submitted to the Board and the Regional Director in the representation proceeding. Moreover, the facts which Respondent has offered to prove do not conflict with any findings of the Board or the Regional Director in the representation proceeding, and when confronted with pleadings averring the same facts which Respondent offered to prove before me, the Board concluded that no substantial or material issues of fact had been raised warranting a hearing.

As the Board has repeatedly held,[45] its policy is not to allow relitigation in a complaint proceeding of the legal effect of matters which have been previously litigated and decided in a representation proceeding, even though a formal hearing on objections has not been provided. All three issues which Respondent seeks to litigate were aired in the representation case, and it is clear that the Regional Director and the Board, when confronted with allegations identical to those made by Respondent herein, concluded that the proffered matter, even if accepted as true, would not warrant vacating or setting aside the election. Moreover, with reference to the second objection to the election, it may be further observed that Respondent has offered no evidence that there was "chain balloting," "chain voting," or other impairment of the secrecy or integrity of the ballots in the election held in the representation case. Rather Respondent seeks a hearing at which it may conduct an investigation of the discrepancy between the number of ballots cast and the number of names checked off by the observers to the election on the eligibility list. The investigation of objections is not subject to the Administrative

[45] E.g., Carolina Natural Gas Corporation, 157 NLRB No. 67.

Procedure Act, and Respondent is not entitled to a hearing on its objections as a matter of right. "The burden is not on the Board to show that the election was fairly conducted but on respondent to show that it was not." NL.R.B. v. O. K. Van Storage Co., Inc., 297 F. 2d 74, 75 (C.A. 5), enforcing 127 NLRB 1537; N.L.R.B. v. Douglas Electric Membership Corporation, ____ F. 2d ____ (C.A. 5, March 22, 1966); N.L.R.B. v. Mattison Machine Works, 365 U. S. 123. I conclude that Respondent has not supplied "specific evidence which prima facie would warrant setting aside the election" in connection with this objection such as is required to entitle Respondent to a hearing at any stage of these proceedings. N.L.R.B. v. O. K. Van Storage Co., Inc., supra, 297 F. 2d at 75. Accordingly Respondent's attack on the validity of the certification must be rejected.

A question remains as to when Respondent's obligation to bargain arose and its refusal to bargain commenced. Section 3(b) of the Act provides:

> The Board is . . . authorized to delegate to its regional directors its powers under section 9 to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of section 9 and certify the results thereof, except that upon the filing of a request therefor with the Board by any interested person, the Board may review any action of a regional director delegated to him under this paragraph, but *such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director.* (emphasis added)

Sections 102.67 and 102.69(c) delegate authority to the Regional Director to issue a decision on objections dis-

posing of the issues in any case in which he has initially exercised his authority to issue a decision and direction of election. Section 102.67(b) like the statute, specifically provides that the filing of a request for review shall not operate as a stay of the action taken by the Regional Director unless otherwise ordered by the Board. No stay of the Regional Director's certification was ordered or sought in this case. Under these circumstances, I conclude that Respondent's obligation to bargain arose on July 16, 1965, when the Regional Director issued his Certification of Representative and that when Respondent on July 21 and thereafter refused to bargain at the Union's request, it did so at the risk of being found to have refused to bargain in violation of Section 8(a)(5) of the Act in the event that its appeals from the Regional Director's action were denied. Staub Cleaners, Inc., 148 NLRB 278, 296, set aside on other grounds 61 LRRM 2511 (C.A. 2). See also Ken Lee, Inc., 137 NLRB 1642, enfd. 325 F. 2d (C.A. 5); Phaostron Instrument & Electronic Co., 152 NLRB No. 37. Accordingly, I conclude that on July 21, 1965, and thereafter Respondent refused and has continued to refuse to bargain in violation of Section 8(a)(5) of the Act.

E. The strike.

The complaint alleges that on or about August 17, 1965, certain of Respondent's employees ceased work and went on strike, that the strike continued since that date, and that it was caused and/or prolonged by Respondent's unfair labor practices.

Respondent contends that these allegations are not proper for consideration in this case because Respondent has not been charged with discriminatorily refusing to reinstate any striker or any other violation of the Act to which the nature of the strike has any relevance. This contention was rejected by Trial Examiner Kessel in ruling on Respondent's pretrial motion to strike herein. Although

Respondent correctly states that the Board's Order in Buffalo Arms, Inc., 110 NLRB 816, cited in the Order denying Respondent's Motion, was set aside at 224 F. 2d 105 (C.A. 2), the Court's decision therein did not reach the issue for which it was cited. I am satisfied that the allegations pertaining to the strike are properly considered herein and may be the basis of an appropriate order as part of the remedy for the unfair labor practices, if the strike was an unfair labor practice strike. J. H. Rutter-Rex Manufacturing Company, Inc., 115 NLRB 388, enfd. 245 F. 2d 594 (C.A. 5). See 245 F. 2d at 597-598.

Respondent contends further that the facts adduced at the hearing, which are largely undisputed, fail to establish that the strike was caused by its unfair labor practices. The facts relating to the strike are as follows:

On December 23, 1964, Teamsters Local Union No. 89 was certified as the representative of Respondent's truckdrivers. Around February 1, 1965, Respondent and Local 89 commenced negotiations. As of August 1, no agreement had been reached between them.

On August 4, 1965, Local 236 held a meeting of its members employed by Respondent. The notice for this meeting stated:

> "A SHOWDOWN IS COMING . . . Already plans are being made for JOINT ACTION between Furniture Workers Local 236 and Teamsters Local 89. The negotiating committees of Local 236 and Local 89 will meet prior to the general membership meeting on Wednesday, at 5:30 P.M."

Approximately 175 employees attended and voted unanimously to give authority to the Union's negotiating committee to call a strike at their discretion. McCormick, Regional Director of the parent International of Local 236 chaired the meeting and told the employees that he recom-

mended adoption of the resolution in the face of Respondent's continued harassment to union people and the Company's continuing refusal to bargain with Local 236. Saul Silverman, national organizational coordinator of the United Furniture Workers and Atterbury, a representative of Teamsters Local 89, were also present at the Local 236 meeting. Silverman mentioned the Teamster negotiations and the fact that no agreement had been reached with the Teamsters after 6 months of negotiations.

On August 5, 1965, McCormick sent Respondent a telegram charging that Respondent's letter of July 21, 1965, in which it declined the Union's request to bargain as premature, constituted an unfair labor practice. The telegram continued: "At a meeting called of the production and maintenance employees of your Company on August 4, 1965, a unanimous vote to strike against the continuing unfair labor practices of the Company took place." The letter then repeated the Union's demand for immediate bargaining.

On August 9, under the auspices of the Federal Mediation and Conciliation Service, representatives of Respondent and the Union met, after McCormick and Respondent's Attorney Smith signed the following memorandum:

> It is understood by both parties that this is an off-the-record meeting held at the invitation of F.M.C.S. and will not be used in any way by either party in any pending or future proceeding. The sole purpose of the meeting is an attempt to improve the atmosphere.

During the course of this meeting, Silverman, who was present, pressed for immediate negotiations, and Smith, who spoke for Respondent, took the position that Respondent would not decide on its course of action until after the Board had decided its appeal. During the course of the

meeting, Smith told Silverman Respondent would inform the Union whether or not it would bargain within 24 hours after the Board's Decision was received, and Silverman stated that he would take no action until after hearing from Smith following the Board's Decision.[46] The discussion then turned to measures which might be taken to ease tensions in the plant in the interim.

On August 16, Respondent and Teamsters Local 89 met all day and again in the evening in an effort to resolve their remaining differences. Early in the morning on August 17, the negotiations terminated with the parties deadlocked. During the course of the meeting, Teamsters representative Atterbury told Respondent that if no agreement was reached, a strike would start the next day.

The next morning August 17, Silverman called Smith and informed him that if the Teamsters went on a legitimate strike, the Furniture Workers would help them in every way they could. Silverman also stated that the Furniture Workers would not only respect the Teamster pickets lines but that their "official position" would be that their patience had run out and that they were striking be-

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[46]These findings are based on the testimony of Wedding and Milton P. Conrad III. Respondent characterizes this exchange as an agreement not to strike and relies upon it as evidence that Respondent's refusal to bargain was not the cause of the strike, which commenced before the Board decided its appeal. In view of the nature of the meeting, the memorandum executed preceding the meeting at Respondent's insistance, and nature of the discussion described by Wedding and Conrad, I view the statements of Smith and Silverman as statements of their present intention rather than offer and acceptance constituting a verbal agreement. In any event, I would not find, and it does not appear to be urged, that this exchange constituted an unequivocal waiver of the employees' right to strike until after the Board's Decision on Respondent's appeal had issued. Even absent the memorandum, as Respondent refused to recognize the Union as representative of its employees, it would be difficult to conclude that Respondent entered into any agreement with the Union in its representative capacity.

cause of Respondent's unfair labor practices and refusal to bargain.[47]

During this conversation Smith reminded Silverman of the agreement reached at the August 9 meeting that the Furniture Workers would not go out on strike or take any action until the Board had decided the representation case. Silverman replied that he expected to be dealing with Smith for a long time, that he did not want to be underhanded or accused of doing things behind the backs of others, and that he had called for the purpose of letting Smith know what the situation was. During the conversation, Silverman also reminded Smith that he had told Smith on August 9 that the employees had voted that if the Teamsters struck, they would also strike.

On the morning of August 17, the Teamsters struck and began to picket Respondent's plant shortly before noon. During the morning the Union's negotiating committee met and called a membership meeting at noon. At the noon meeting, again attended by approximately 175 employees of Respondent, McCormick told the employees that there was no indication that Respondent intended to bargain and recommended that they strike immediately for a contract. They voted to do so, and the strike began at around 1 p.m. Pickets were posted at that time with signs bearing the following legends: "UFWA-AFL-CIO, United Furniture Workers on strike, Louisville Chair Company refuses to bargain with Local 236" and "AFL-UFWA-CIO on strike against the unfair labor practices of the Louisville Chair Company. Local 236." Signs bearing these legends continued in use throughout the course of the strike. The Union did not communicate further with Respondent from

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[47]Silverman also stated "I hope you understand what I am saying or rather what I am not saying." Smith replied that he did not, and Silverman explained "Well if the Teamsters go out then the Furniture Workers will feel morally obligated to do something more than simply stand by."

August 17 until it sent its telegram of September 2, reiterating its bargaining demand.

On September 17, Respondent and Teamsters Local 89 reached an agreement, and the drivers returned to work shortly thereafter. However, the production and maintenance workers remained on strike and were still on strike at the time of the hearing herein.[48]

It is evident from the above that the timing of the strike was influenced and probably determined by the breakdown in the negotiations between Respondent and the Teamsters. It may well have been that but for the Teamsters' strike, the Union would not have struck at least until after the Board had acted upon Respondent's appeal from the certification. To that extent the Teamsters' strike was certainly a cause of the Union's strike. But it does not follow that the Teamsters' strike was the sole cause of the strike, and there is substantial evidence that the Union would not have struck Respondent but for its separate dispute over Respondent's refusal to honor the certification and bargain. Thus, even before the Teamsters struck, the members from Respondent's plant voted to authorize a strike against Respondent, and in determining to take strike action, the membership had before it Respondent's refusal to bargain with the Union as well as the Teamsters' dispute. The signs carried by the strikers protested the refusal to bargain, and no action taken by the Union was inconsistent with its contention that the strike was in protest of that refusal. To the contrary, when the Teamsters'

[48]On November 11, shortly before the hearing commenced herein, Sloan, a vice president of the United Furniture Workers of America telephoned Smith to inquire whether they could meet to attempt to settle the dispute. During the course of the conversation, Smith quoted Silverman as stating that the Union's official position was that the patience of Local 236 had run out at the same time as the Teamsters. Sloan stated that he did not understand that this was the cause of the strike but understood that the Teamsters struck first and the Furniture Workers recognized their picket line.

strike ended, the Union's strike continued, indicating a substantial independent cause of the strike. I find nothing in the statements of union representatives to indicate the contrary. The statements of Silverman, who was present on August 9, to Smith on August 17 undoubtedly reveal that the timing of the strike by Local 236 was determined by the Teamsters' decision to strike. But they do not concede the lack of any separate cause for the strike.[49] Rather they indicate a determination to act contrary to his indicated intention on August 7 so that Local 236 would do more than merely support the Teamsters strike.

On the facts thus presented I conclude that the strike had at worst dual causes and was an unfair labor practice strike from its start.[50]

IV. The effect of the unfair labor practices upon commerce.

The activities of the Respondent set forth in Section III, above, occurring in connection with its operations described in Section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

V. The remedy.

Having found that Respondent engaged in certain violations of Sections 8(a)(1), (3), and (5) of the Act, I shall recommend that it cease and desist therefrom and take cer-

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[49]The statement on November 11 of Sloan, who as far as the record shows had no first hand knowledge of the facts, con be given no greater significance, particularly in view of the fact that at the time of his conversation with Smith the Teamsters' strike had been over for nearly 2 months and the Local 236 strike continued.

[50]The Little Rock Downtowner, Inc., 145 NLRB 1286, 1311-1312, enfd. as mod. 341 F. 2d 1020 (C.A. 8). See Wooster Division of Borg-Warner Corporation, 121 NLRB 1492, following 236 F. 2d 898 (C.A. 6).

tain affirmative action designed to effectuate the policies of the Act.

As Respondent on or about July 21, 1956, and at all times thereafter refused and still refuses to bargain with the Union as the representative of its employees in an appropriate unit, it will be recommended that Respondent, upon request, bargain collectively with the Union, and in the event that an understanding is reached, embody such understanding in a signed agreement.

It has been found that at the time of the hearing Respondent's employees were engaged in a strike caused and prolonged by Respondent's unlawful refusal to bargain. The striking employees were therefore entitled to reinstatement upon application, whether or not their positions had been filled by the hire of replacements. Accordingly, in order to effectuate the policies of the Act, it will be recommended that Respondent shall, upon application, offer reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights or privileges, to all employees who went on strike on August 17, or thereafter, dismissing, if necessary, any persons hired on or after that date.[51] It is also recommended that Respondent make whole those employees who went on strike on August 17, 1965, or thereafter, for any loss of pay they may have suffered or may suffer by reason of Respondent's refusal, if any, to reinstate them, by payment to each of them of a sum of money equal to that which he normally would have earned as wages during the period from five (5) days after the date on which he applies for reinstatement, to the date of Respondent's offer of reinstatement, less his net earnings, to which shall be added interest at the rate of 6 percent per annum, in accordance with the formula set forth in F. W. Woolworth Co., 90

[51]Buffalo Arms, Inc., supra; J. H. Rutter-Rex Manufacturing Company, Inc., supra.

NLRB 289, and Isis Plumbing & Heating Co., 138 NLRB 716.

With respect to Wayne G. Hale, who was discharged in violation of Section 8(a)(1), and Joseph E. Sweet, who was discriminatorily denied employment, effectuation of the policies of the Act would ordinarily require that they be offered reinstatement and employment, respectively, with back pay. However, it appears that on August 23, 1965, after the strike had started, Respondent mailed letters to Hale and Sweet in which Respondent offered Hale employment substantially equivalent to the job he held before his discharge and offered Sweet employment. On or about August 25, Sweet and Hale separately visited the plant in response to the letters and told Superintendent Wedding they would like to work but would not cross the picket line to do so. I find that thereby both Hale and Sweet became unfair labor practice strikers on August 25, 1965, who thereafter voluntarily withheld their services in support of the strike.

Accordingly, it will be recommended that as in the case of the other unfair labor practice strikers, Respondent shall, upon application, offer Hale reinstatement to his former or a substantially equivalent position, without prejudice to his seniority or other rights or privileges, and shall, upon application, offer Sweet immediate employment at the same position as, or a position substantially equivalent to, that at which he would have been employed if he had not been discriminated against, without prejudice to any seniority or other rights and privileges he might have acquired. It is further recommended that Respondent make Hale and Sweet whole for any loss of earnings suffered by them as a result of the discharge and refusal to hire, respectively, by payment to each of them of a sum of money equal to that which they normally would have earned as wages during the period from May 27, 1965, in the case of Hale, and July 12, 1965, in the case of

Sweet, until August 25, 1965, when they became unfair labor practice strikers. Further, it will be recommended that Respondent make them whole for any loss of pay they may have suffered or may suffer by reason of Respondent's refusal, if any, to reinstate Hale or employ Sweet by payment to each of them of a sum of money equal to that which he normally would have earned as wages during the period from five (5) days after the date on which he applies for reinstatement or employment, respectively, to the date of Respondent's offer of reinstatement or employment.[52] From these sums of money net earnings shall be deducted and interest added at the rate of 6 percent per annum, in accordance with the formula set forth in F. W. Woolworth Co., supra, and Isis Plumbing & Heating Co., supra.

Conclusions of Law.

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. Local 236, United Furniture Workers of America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees employed by Respondent at its Louisville, Kentucky, plant, including all plant clerical employees, garage mechanics and their helpers, but excluding all truck drivers, and spotters, all office clerical employees, guards, professional employees and supervisors as defined in the Act, constitute a unit appropriate for collective bargaining with in the meaning of Section 9(b) of the Act.

4. At all times since July 16, 1965, the Union has been, and now is, the exclusive representative of the employees in the said unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

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[52]Northern Virginia Sun Publishing Company, 134 NLRB 1007, 1008-1010, vacated and remanded on other grounds, 314 F. 2d 260 (C.A. D.C.).

5. By threatening employees with discharge for union activity, by discharging Wayne G. Hale for his conduct while engaged in protected union activity, by refusing to consider Joseph E. Sweet's application for employment for discriminatory reasons, and by refusing on and since July 21, 1965, to bargain collectively with the Union as the representative of the employees in the above unit, the Respondent has engaged in and is engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1), (3), and (5) and 2(6) and (7) of the Act.

Recommended Order.

Upon the basis of the foregoing findings of fact and conclusions of the law, and pursuant to Section 10(c) of the Act, I hereby recommend that Respondent, Louisville Chair Company, Inc., Louisville, Kentucky, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening employees with discharge or other reprisal for engaging in protected union activities under color of enforcement of a discriminatorily applied rule against solicitation during working hours or otherwise.

(b) Discharging employees because of conduct which constitutes concerted activity protected by Section 7 of the Act.

(c) Discouraging membership in Local 236, United Furniture Workers of America, AFL-CIO, or any other labor organization, by refusing to consider applications for employment or otherwise discriminating in regard to the hire and tenure of employees or any term or condition of their employment, except as authorized in Section 8(a)(3) of the Act, as amended.

(d) Refusing to bargain collectively in good faith concerning rates of pay, hours of employment, and other terms and conditions of employment with local 236, United Furniture Workers of America, AFL-CIO, as the exclusive

representative of the employees in the appropriate unit described in paragraph 3 of the section of the Decision entitled, "Conclusions of Law."

(e) In any like or related manner interfering with, restraining or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist the above-named or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in any other activity for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

2. Take the following affirmative action which it is found will effectuate the policies of the Act:

(a) Upon request, bargain collectively with the above-named Union as the exclusive representative of all employees in the appropriate unit, and embody in a signed agreement any understanding reached.

(b) Upon application, offer immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, to Wayne G. Hale and all those employees who went on strike on August 17, 1965, or thereafter, and upon application, offer to Joseph E. Sweet immediate employment at the same position as, or a position substantially equivalent to, that at which he would have been employed had he not been discriminated against, without prejudice to any seniority or other rights and privileges he might have acquired, dismissing if necessary any persons hired on or after August 17, 1965.

(c) Make whole all the employees referred to in paragraph (b) above in the manner set forth in the section of the above Decision entitled, "The remedy."

(d) Notify the above-mentioned employees, if presently serving in the Armed Forces of the United States, of their right to full reinstatement, or in the case of Joseph E. Sweet, employment, upon application in accordance with the Selective Service Act and the Universal Military Train-

ing and Service Act of 1948, as amended, after discharge from the Armed Forces.

(e) Preserve and upon request make available to the Board or its agents for examination and copying all payroll records, social security payment records, timecards, personnel records and reports, and all other records relevant and necessary to a determination of compliance with paragraphs (b), (c), and (d) above.

(f) Post in conspicuous places at its Louisville, Kentucky, place of business, including all places where notices to employees are customarily posted, copies of the notice attached hereto and marked "Appendix."[53] Copies of said notice to be furnished by the Regional Director for the Ninth Region shall after being duly signed by the Respondent's representative, be posted by it immediately upon receipt thereof and be maintained by it for at least 60 consecutive days thereafter. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(g) Notify said Regional Director in writing within 20 days from the receipt of this Decision what steps Respondent has taken to comply herewith.[54]

It is further recommended that the complaint otherwise be dismissed.

Dated at Washington, D. C.

(s) David S. Davidson,
Trial Examiner.

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[53]In the event that this Recommended Order be adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDED ORDER OF A TRIAL EXAMINER" in the notice. In the further event that the Board's Order be enforced by a decree of a United States Court of Appeals, the words "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" shall be substituted for the words "A DECISION AND ORDER."

[54]In the event that this Recommended Order be adopted by the Board, this provision shall be modified to read: "Notify said Regional Director in writing within 10 days from the date of this Order what steps the Respondent has taken to comply herewith."

APPENDIX.

NOTICE TO ALL EMPLOYEES PURSUANT TO

The Recommended Order of a Trial Examiner of the
NATIONAL LABOR RELATIONS BOARD
and in order to effectuate the policies of the
NATIONAL LABOR RELATIONS ACT
(As Amended)

we hereby notify our employees that:

We Will bargain collectively upon request with Local 236, United Furniture Workers of America, AFL-CIO, as the exclusive representative of all the employees in the bargaining unit described below with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement.

The bargaining unit is:

All production and maintenance employees at our Louisville, Kentucky plant, including all plant clerical employees, garage mechanics and their helpers, but excluding all truck drivers and spotters, all office clerical employees, guards, professional employees and supervisors as defined in the Act.

We Will, upon application, offer Wayne G. Hale and all employees who went on strike on August 17, 1965, or thereafter, immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and we will offer to Joseph Sweet immediate employment at the same position as, or a position substantially equivalent to, that at which he would have

been employed had he not been discriminated against, without prejudice to any seniority or other rights and privileges he might have acquired, dismissing if necessary any persons hired on or after August 17, 1965.

We Will make the above-mentioned employees whole for any loss of pay they may suffer as a result of our refusal to reinstate or employ them upon application, and we will make Wayne G. Hale and Joseph Sweet whole additionally for any loss of pay they may have suffered as a result of the discharge of Hale and the refusal to employ Sweet from the respective dates thereof until August 25, 1965, when they rejected offers of employment because of the strike.

We Will Not discharge employees because of conduct which constitutes concerted activity protected by Section 7 of the Act.

We Will Not discourage membership in Local 236, United Furniture Workers of America, AFL-CIO, or any other labor organization, by discriminatorily refusing to employ any applicant for employment or by discriminating in any other manner in regard to the hire or tenure of employment of employees, or any term or condition of employment.

We Will Not threaten employees with discharge or other reprisal for engaging in protected union activities under color of enforcement of a discriminatorily applied rule against solicitation during working hours or otherwise.

We Will Not in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights to self-organization, to form labor organizations, to join or assist Local 236, United Furniture Workers of America, AFL-CIO, or any other labor organization, to bargain collectively through representa-

tives of their own choosing, and to engage in other concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

Louisville Chair Company, Inc.
(Employer)

Dated..... By.....
(Representative) (Title)

Note:—We will notify the above-mentioned employees, if presently serving in the Armed Forces of the United States, of their right to full reinstatement or employment, as the case may be, upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act of 1948, as amended, after discharge from the Armed Forces.

This Notice must remain posted 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, Room 2023, Federal Office Building, 550 Main Street, Cincinnati, Ohio 45202 (Tel. No. 684-3627).

The Fifth Amendment to the Constitution of the United States which is relied upon by the Petitioner in this case provides as follows:

> "No person shall be held to answer for capital, or otherwise infamous crime, unless on a presentment or indictment for a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. §§ 151, et seq.) relied upon by the Petitioner in this case are as follows:

Section 10 * * *

> "(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: Provided, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was pre-

vented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, as far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U.S.C., title 28, secs. 723-B, 723-C).

"(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act; Provided,

That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: And provided further, That in determining whether a complaint shall issue alleging a violation of section 8(a)(1) or section 8(a)(2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed."

* * * * * * *

"(e) The Board shall have power to petition any United States court of appeals, or if all the United States courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the

facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28."

The provisions of the National Labor Relations Board's Statements of Procedure—Series 8, as amended (29 C.F.R. §§101.1 et seq.) relied upon by the Petitioner in this case are as follows:

Section 101.10

"(a) Except in extraordinary situations the hearing is open to the public and usually conducted in the region where the charge originated. A duly designated trial examiner presides over the hearing. The Government's case is conducted by an attorney attached to the Board's regional office, who has the responsibility of presenting the evidence in support of the complaint. The rules of evidence applicable in the district courts of the United States under the Rules of Civil Procedure adopted by the Supreme Court are, so far as practicable, controlling. Counsel for the general counsel, all parties to the proceeding, and the trial exam-

iner have the power to call, examine, and cross-examine witnesses and to introduce evidence into the record. They may also submit briefs, engage in oral argument, and submit proposed findings and conclusions to the trial examiner. The attendance and testimony of witnesses and the production of evidence material to any matter under investigation may be compelled by subpena.

"(b) The functions of all trial examiners and other Board agents or employees participating in decisions in conformity with Section 8 of the Administrative Procedure Act are conducted in an impartial manner and any such trial examiner, agent, or employee may at any time withdraw if he deems himself disqualified because of bias or prejudice. The Board's attorney has the burden of proof of violations of Section 8 of the National Labor Relations Act and Section 222(f) of the Telegraph Merger Act. In connection with hearings subject to the provisions of Section 7 of the Administrative Procedure Act:

"(1) No sanction is imposed or rule or order issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the preponderance of the reliable, probative, and substantial evidence;

"(2) Every party has the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts; and

"(3) Where any decision rests on official notice of a material fact not appearing in the evidence in the record, any party is on timely request afforded a reasonable opportunity to show the contrary."

Section 101.21 • • •

"(c) With respect to objections to the conduct of the election and challenged ballots, the regional director may, in his discretion, (1) issue a report on such objection and/or challenged ballots and transmit the issues to the Board for resolution, as in cases involving consent elections to be followed by Board certifications, or (2) decide the issues on the basis of the administrative investigation or after a hearing, with the right to transfer the case to the Board for decision at any time prior to his disposition of the issues on the merits. In the event the regional director adopts the first procedure, the parties have the same rights, and the same procedure is followed, as has already been described in connection with the post election procedures in cases involving consent election to be followed by Board certification. In the event the regional director adopts the second procedure, the parites have the same rights, and the same procedure is followed, as has already been described in connection with hearings before elections."

The provisions of the National Labor Relations Board's Rules and Regulations—Series 8, as amended (29 C.F.R. §§102.1 et seq.) relied upon by the Petitioner in this case are as follows:

Section 102.38.

"Rights of parties.—Any party shall have the right to appear at such hearing in person, by counsel, or by other representative, to call, examine and cross-examine witnesses, and to introduce into the record documentary or other evidence, except that the participation of any party shall be limited to the extent permitted by the trial examiner: And provided further,

That documentary evidence shall be submitted in duplicate."

Section 102.48 • • •.

"(b) Upon the filing of timely and proper exceptions, and any cross-exceptions, or answering briefs, as provided in section 102.46, the Board may decide the matter forthwith upon the record, or after oral argument, or may reopen the record and receive further evidence before a member of the Board or other Board agent or agency, or may close the case upon compliance with recommendations of the trial examiner decision, or make other disposition of the case."

Section 102.69 • • •

"(c) If objections are filed to the conduct of the election or conduct affecting the result of the election, or if the challenged ballots are sufficient in number to affect the result of the election, the regional director shall investigate such objections or challenges or both. If a consent election has been held pursuant to section 102.62(b) the regional director shall prepare and cause to be served upon the parties a report on challenged ballots or objections, or both, including his recommendations, which report, together with the tally of ballots, he shall forward to the Board in Washington, D. C. Within 10 days from the date of issuance of the report on challenged ballots or objections, or both, or within such further period as the Board may allow upon written request to the Board for an extension received not later than 3 days before such exceptions are due in Washington, D. C., with copies of such request served on the other parties, any party may file with the Board in Washington, D. C., eight copies of exceptions to such report which shall be printed or otherwise legibly duplicated, except the

carbon copies of typewritten matter shall not be filed and if submitted will not be accepted. Immediately upon the filing of such exceptions, the party filing the same shall serve a copy thereof on the other parties and shall file a copy with the regional director. A statement of service shall be made to the Board simultaneously with the filing of exceptions. If no exceptions are filed to such report, the Board, upon the expiration of the period for filing such exceptions, may decide the matter forthwith upon the record or may make other disposition of the case. The report on challenged ballots may be consolidated with the report on objections in appropriate cases. If the election has been conducted pursuant to a direction of election issued following any proceeding under section 102.67, the regional director may (1) issue a report on objections or challenged ballots, or both, as in the case of a consent election pursuant to section 102.67(b), or (2) exercise his authority to decide the case and issue a decision disposing of the issues and directing appropriate action or certifying the results of the election. In either instance, such action by the regional director may be on the basis of an administrative investigation or, if it appears to the regional director that substantial and material factual issues exist which can be resolved only after a hearing, on the basis of a hearing before a hearing officer, designated by the regional director. If the regional director issues a report on objections and challenges, the parties shall have the rights set forth in subsections (c) and (e) of this section; if the regional director issues a decision, the parties shall have the rights set forth in section 102.67 to the extent consistent herewith."

LIBRARY
SUPREME COURT, U. S.

In the Supreme Court of the United States

OCTOBER TERM, 1967

LOUISVILLE CHAIR COMPANY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1158

LOUISVILLE CHAIR COMPANY, INC., PETITIONER

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 385 F. 2d 922. The decision and order of the National Labor Relations Board (Pet. App. 13a-69a) are reported at 161 NLRB No. 31.

JURISDICTION

The decision of the court of appeals was entered on December 1, 1967 (Pet. App. 1a). The petition

for a writ of certiorari was filed on February 26, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 10(e) of the National Labor Relations Act (29 U.S.C. 160(e)).

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, the Board properly concluded that the employer's objections to a representation election did not raise issues which warranted an evidentiary hearing.

2. Whether substantial evidence supports the Board's finding that a strike called by the union was attributable, at least in part, to the employer's unfair labor practices.

STATUTE AND REGULATIONS INVOLVED

The relevant provisions of the National Labor Relations Act (61 Stat. 136, 29 U.S.C. 151, *et seq.*) and of the Board's Rules and Regulations and Statements of Procedure (29 C.F.R. 101.1, *et seq.*) are set forth in Appendix C to the petition (Pet. App. 71a-79a).

STATEMENT

Early in 1965, the Union [1] began an organizing campaign among the approximately 300 production and maintenance employees at the Company's plant in Louisville, Kentucky (Pet. App. 16a-17a). As described below, the campaign culminated in a Board election which the Union won, and the Board certified

[1] Local 236, United Furniture Workers of America, AFL-CIO.

it as the employees' bargaining representative. The Board found that the Company violated Section 8(a)(1) and (3) of the Act by threatening employees with reprisals because of their union activity, and by refusing to consider an applicant for employment because of his past union activity (Pet. App. 21a-24a, 32a-34a, 41a-49a). The court of appeals sustained these findings (Pet. App. 2a-6a), and petitioner does not challenge them here. Petitioner, however, challenges the Board's further findings that it refused to bargain with the Union, and that a strike which ensued was attributable to its unfair labor practices. The relevant facts with regard to these issues are as follows:

On May 12, 1965, the Union distributed a handbill to the employees stating that a Board election would be held on May 27,[2] and urging them to vote for the Union (J.A. 447a-448a). At the end of the handbill the following statement appeared (*ibid.*):

> The Company's gross profit for the last fiscal year was—$1,730,111—VOTE YES. Lets get our share of the pie!!

On May 24, the Union distributed a second handbill which again stated that the Company's gross profit for the prior year was $1,730,111 (J.A. 449a-450a).

The Board election, held on May 27, resulted in a vote of 187 for and 112 against the Union, with 3 void ballots (Pet. App. 17a, 49a; J.A. 434a). The Company filed objections to the election, contending

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[2] The Union had filed a petition for an election with the Board on February 4 (J.A. 404a-407a). "J.A." refers to the Joint Appendix filed in the court below.

that: (1) the reference to gross rather than net profits in the Union's handbills was "grossly and materially misleading"; and (2) although 302 ballots were cast, only 300 of the 307 names on the eligibility list had been checked off by the election observers[3] as having voted (Pet. App. 49a-50a; J.A. 435a-437a). After investigation, the Board's Regional Director concluded that neither of the Company's objections raised substantial or material issues warranting a hearing or setting aside the election; accordingly, he overruled the Company's objections and certified the Union as the employees' representative (Pet. App. 50a; J.A. 441a-447a, 43a). In finding that the pre-election handbills did not impair the employees' freedom of choice in the election, the Director noted that the statements were accurate and contained no threat of reprisal, promise of benefit or material misrepresentation, and, in addition, that the Company had ample time (two weeks) to make any explanation it may have deemed necessary (J.A. 444a-445a). With respect to the existence of two more ballots than there were names checked off on the eligibility list, the Director noted that the Company had an observer at the election, that it failed to offer any evidence of wrongdoing, and that the two extra ballots could not have affected the election (J.A. 445a-446a).

On July 19, the Union requested a meeting with the Company to negotiate a collective bargaining agreement (Pet. App. 50a; J.A. 492a). The Company refused to meet with the Union on the ground

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[3] Both the Union and the Company had observers present at the election.

that it planned to appeal the Director's decision to the Board. The Company thereupon filed various motions with the Board, all of which were denied as raising "no substantial issues" (Pet. App. 50a-51a; J.A. 450a, 484a, 489a, 491a).

On August 4, the Union held a meeting of the Company employees whom it represented (Pet. App. 55a; J.A. 214a). The notice for this meeting stated:

> A SHOWDOWN IS COMING . . . Already plans are being made for joint action between *Furniture Workers Local 236 and Teamsters Local 89*.[4] The negotiating committees of Local 236 and Local 89 will meet prior to the general membership meeting on Wednesday, at 5:30 P.M. [Pet. App. 55a; J.A. 503a, 504a.]

Approximately 175 employees attended the meeting and voted unanimously to give the Union's negotiating committee authority to call a strike at its discretion (Pet. App. 55a; J.A. 214a, 215a). A Union representative had requested such authorization in view of the Company's continued harassment of union adherents and its continuing refusal to bargain (Pet. App. 55a-56a; J.A. 216a). The next day the Union sent a telegram to the Company stating that its refusal to bargain was an unfair labor practice and that the employees present at the Union's meeting had voted unanimously to strike (Pet. App. 56a; J.A. 505a-506a).

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[4] On December 23, 1964, Teamsters' Local 89 was certified as the representative of the Company's truckdrivers. Around February 1, negotiations commenced with Local 89, but, by August, an agreement had still not been reached (Pet. App. 55a; J.A. 350a).

The Union did not strike at that time, but agreed to meet with the Company under the auspices of the Federal Mediation and Conciliation Service (Pet. App. 56a-57a; J.A. 604a-605a). On the morning of August 17, however, Teamsters Local 89 (see n. 4, *supra*) struck and began to picket the plant (Pet. App. 58a; J.A. 358a). The Union held a meeting at noon, and the employees, after being told that there was no indication that the Company intended to bargain, voted to strike immediately (Pet. App. 58a; J.A. 218a-219a). Pickets were posted in front of the plant, with signs reading: "UFWA-AFL-CIO, United Furniture Workers on strike, Louisville Chair Company refuses to bargain with Local 236;" and "AFL-UFWA-CIO on strike against the unfair labor practices of the Louisville Chair Company. Local 236." (Pet. App. 58a; J.A. 248a.)

On September 17, the Company and Teamsters Local 89 reached an agreement, and the drivers represented by that union returned to work shortly thereafter (Pet. App. 59a; J.A. 359a). The production and maintenance workers, however, remained on strike (Pet. App. 59a).[5] On October 21, the General Counsel of the Board, based upon charges filed by the Union, issued an unfair labor practice complaint against the Company (Pet. App. 16a).

At the unfair labor practice hearing the Company sought to relitigate the issues respecting the Union handbills and the two-ballot discrepancy which it had

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[5] They were still on strike in November, at the time of the Board unfair labor practice hearing (Pet. App. 59a).

raised in the representation proceeding. The Trial Examiner excluded this evidence because it was substantially the same as that presented in the representation proceeding (Pet. App. 51a-52a); he further found that the Company "has not supplied specific evidence which *prima facie* would warrant setting aside the election * * * at any stage of these proceedings" (Pet. App. 53a). The Board, adopting the Examiner's findings, held, *inter alia*, that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union, that the strike was an unfair labor practice strike since at least one of its causes was the Company's unlawful refusal to bargain, and that the Company was thus obligated to reinstate the strikers upon their application (Pet. App. 53a-54a, 59a-60a). The Board ordered the Company to bargain upon request with the Union and to offer reinstatement to the striking employees (Pet. App. 14a, 65a).

The court of appeals sustained the Board's findings and conclusions, and enforced its order (Pet. App. 1a-12a).

ARGUMENT

1. The principal question presented (Pet. 10-17) is whether the Company's two objections to the representation election raised substantial and material issues of fact which required an evidentiary hearing.[6] This issue, which turns on the circumstances of this

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[6] Section 102.69(c) of the Board's Rules (Pet. App. 78a-79a) provides for an evidentiary hearing where objections present "substantial and material factual issues."

particular case, does not warrant further review. Moreover, the court below correctly concluded that the Board properly rejected the Company's objections without a hearing.

There is no dispute as to what the Union's handbills said; the dispute concerns the Board's conclusion that the reference in the handbills to the Company's gross, rather than its net, profits did not interfere with the employees' freedom of choice in the election. An evidentiary hearing was not required to resolve that issue, which turned on the significance of undisputed facts. Furthermore, the Board properly rejected the Company's contention. As the court below pointed out, "ambiguity in campaign propaganda is not sufficient by itself to vitiate an election," particularly where, as here, "the handbills did not contain material within the special knowledge of the Union * * *, and [they were] not disseminated at a time or in a manner calculated to deprive the [Company] of an opportunity to reply" (Pet. App. 8a).

Nor was the Company entitled to a hearing on its objection that two "extra" ballots had been cast. Such a minor discrepancy between the number of ballots counted and the number of voters checked off on the eligibility list did not impair the validity of the election. Since the Union won by 75 votes, the two ballots could not have affected the outcome. The discrepancy does not indicate that the election procedure was intrinsically defective. A person improperly or accidentally left off the eligibility list may have voted, or a person on the list may have voted without having his name checked off. In these circumstances, the burden

was on the Company to show how the discrepancy affected the results of the election[7]—a burden which, as the court below found (Pet. App. 9a), it did not sustain.[8]

2. The Company also contends (Pet. 17-18) that the court below erred in affirming the Board's finding that the strike of August 17 was an unfair labor practice strike because it was caused, at least in part, by the Company's refusal to bargain in good faith with the Union. The question whether the strike was caused by the Company's unfair labor practices, or was purely a sympathetic response to the Teamsters' strike (as the Company contends), presents only an evidentiary issue which does not warrant further review. *National Labor Relations Board* v. *Pittsburgh S.S. Co.*, 340 U.S. 498, 502-503; *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490-491. In any event, the facts summarized in the Statement, *supra*, pp. 5-6, and in the opinion of the court below (Pet. App. 11a-12a), show that the Board was fully justified in concluding that the Company's unfair labor practices were at least one of the

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[7] "In the absence of proof by the employer that there has been prejudice to the fairness of the election such trivial irregularities of administrative procedure do not afford a basis for denying enforcement to an otherwise valid Board order." *National Labor Relations Board* v. *Mattison Machine Works*, 365 U.S. 123, 124.

[8] The cases relied on by the Company (Pet. 14-16) are distinguishable. They either involve situations where there was no opportunity to reply to the union's misrepresentation, or the objections to the election raised substantial and material issues of fact.

causes of the strike; and that fact justified the Board in ordering reinstatement of the strikers.[9]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1968.

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[9] "It is well established that 'a strike may be an unfair labor practice strike even though it also has economic objectives.' " *National Labor Relations Board* v. *Sea-Land Service, Inc.*, 356 F. 2d 955, 965 (C.A. 1). Accord: *National Labor Relations Board* v. *Fitzgerald Mills Corp.*, 313 F. 2d 260, 269 (C.A. 2); *Butcher Boy Refrigerator Door Co.* v. *National Labor Relations Board*, 290 F. 2d 22, 23 (C.A. 7); *National Labor Relations Board* v. *Stilley Plywood Co.*, 199 F. 2d 319, 320-321 (C.A. 4), certiorari denied, 344 U.S. 933; *National Labor Relations Board* v. *A. Sartorius & Co.*, 140 F. 2d 203, 206 (C.A. 2); *National Labor Relations Board* v. *Stackople Carbon Co.*, 105 F. 2d 167, 175 (C.A. 3).

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 1158

LOUISVILLE CHAIR COMPANY, INC., - Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD and UNITED FURNITURE WORKERS OF AMERICA, LOCAL # 236, AFL-CIO, - - Respondents.

SUPPLEMENTAL BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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IN THE

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v.

NATIONAL LABOR RELATIONS BOARD and UNITED FURNITURE WORKERS OF AMERICA, LOCAL # 236, AFL-CIO, - *Respondents.*

SUPPLEMENTAL BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Pursuant to Paragraph 5 of Rule 24 of the Rules of the Supreme Court of the United States, Louisville Chair Company, Inc., the Petitioner herein (hereafter called "the Company"), hereby files with the Court this Supplemental Brief in support of the Company's Petition for a Writ of Certiorari. The purpose of this Supplemental Brief is to call the Court's attention to three new cases which were not available to the Company at the time it filed the Petition.

1. *The Company's Right to a Hearing.* The first of these cases is pertinent to the case at bar with re-

spect to the Company's contention that it was entitled to a hearing on its objection to the election based on the irregularity in the conduct of the election, as evidenced by the fact there were more ballots than there were actual voters. In *Austill Waxed Paper Company*, 169 NLRB No. 169 (decided February 29, 1968), the Board overruled its Twelfth Regional Director, sustained an employer's objections to an election, set the election aside and ordered a new election for the following reasons:

> "Under the particular facts of this case, we do not agree with the Regional Director's conclusion that Employer's Objection 2, which raises the issue of the ballot box being left unsealed and unattended for from 2 to 5 minutes, should be overruled. This objection, which goes to the very heart of the conduct of an election,—*maintaining the integrity of the ballot box*—is not, in our opinion, the proper subject for litigation on an *ad hoc* basis. *We do not believe that we should speculate on whether something did or did not occur while the ballot box was left wholly unattended. The Board through its entire history has gone to great lengths to establish and maintain the highest standards possible to avoid any taint of the balloting process; and where a situation exists, which, from its very nature, casts a doubt or cloud over the integrity of the ballot box itself, the practice has been, without hesitation, to set aside the election.*
>
> "It is our belief that the leaving of the ballot box unsealed and unattended for possibly as much as 5 minutes is *a condition that relates directly to*

> *the integrity of the ballot box. It is the Board's responsibility to certify to the validity of its own balloting procedures, and, if it cannot, as here, we believe that in the interest of maintaining our high standards, there is no alernative but to set the election aside and direct a second election.*" (Our emphasis.)

As we pointed out on page 16 of the Petition, "it is the integrity of the election process itself that is on trial where any taint of misconduct permeates the entire process", as in the instant case, and therefore "the parties are entitled to the safeguards of a hearing on the issue".

Another court has recently upheld an employer's right to a hearing on certain challenged ballots because of the Board's *ex parte* administrative determination of the issue. The grounds for this ruling are stated in *Macy's Missouri-Kansas Division* v. *N.L.R.B.*, —— F. 2d ——, 57 CCH Lab. Cas. ¶ 12,495 (8th Cir., decided February 16, 1968), as follows:

> "In a situation of this type *we think Macy's should have an opportunity to present its case to the Board and be afforded a full hearing, instead of receiving a summary rejection of its claim based upon the Regional Director's administrative finding.* In a somewhat similar situation where the Board refused the objecting party a hearing on its objection in connection with a representation election the Fifth Circuit in *NLRB* v. *Lamar Electric Membership Corporation,* 362 F. 2d 505 (5th Cir., 1966), set aside the Board's order and remanded the case to the Board for a hearing, commenting on the Board's action thusly, at 508:

'This treatment of the matter by the Regional Director would obviate the necessity of ever having a hearing on objections to an election. The disputed facts were resolved without testimony under oath, without cross-examination, and without the procedural safeguards of a hearing.'" (Our emphasis.)

Certainly the same can be said with respect to the case at bar, both with regard to the irregularity in the conduct of the election and the Union's misrepresentations to the employees. For example, the presence of two more ballots in the ballot box than there were actual voters raises the possibility of forged ballots and chain balloting, something which the Board has never permitted the Company to investigate and has, from the record, never investigated itself. If the Board truly seeks to "maintain the highest standards possible to avoid any taint of the balloting process" and to maintain "the integrity of the ballot box" (as it said in the *Austill* case, *supra,* it does), it should have, at the very least, granted the Company a hearing on its objection to the election on the ground that the election process was tainted and the integrity of the ballot box was not preserved.

The Company has at all stages of the proceedings before the Board and the court below, subsequent to the election, not only clearly stated the bases for its objections to the election and requested a hearing on those objections, but has offered evidence that *in actual fact* there were more ballots than voters, that certain employees were not present for the election and that the

Board has carefully and meticulously cast a veil of silence over its *ex parte* investigation of the objections to the election and has effectively prevented the Company from pursuing its own investigation through suppression of evidence and denial of the Company's right to examine and cross-examine witnesses.

Such a situation on its face clearly demonstrates that there was some impropriety in the conduct of the election which tainted the integrity of the ballot box. This proffer of evidence by the Company contrasts sharply with the groundless speculations on page 8 of the Brief for the National Labor Relations Board in Opposition herein that "[a] person improperly or accidentally left off the eligibility list *may* have voted, or a person on the list *may* have voted without having his name checked off". (Our emphasis.) There is not one word of evidence in these proceedings to support either one of those surmises.

We submit that the Board's position in the case at bar is directly contrary to its policies stated in the *Austill* case, *supra,* and the other cases cited in the Company's original Petition in this Court. We further submit that the decision of the Eighth Circuit in the *Macy's* case, *supra,* and the other decisions cited in the Petition are directly contrary to the decision of the Sixth Circuit in the case at bar, and that the cited cases amply support and call for the granting of the Company's request for a hearing on its objections.

2. *The Nature of the Strike.* Subsequent to the printing of the Petition for a Writ of Certiorari herein, the Board's decision in *Rogers Brothers Company*

of California, 169 NLRB No. 124 (decided February 15, 1968), came to our attention. It is another case where a union as a "second thought" seized on an employer's unfair labor practice as the ostensible cause of a strike, while the real cause of the strike was economic in character, that is, to put pressure on the employer in its negotiations with the union.

We submit that under the circumstances in the case at bar, it is clear the strike by the Furniture Workers Union was in its inception *only* a sympathy strike in support of the Teamsters Union, and the Company's refusal to bargain with the Furniture Workers Union was not a precipitating cause of the strike and in fact had nothing to do with the strike. Consequently, the Furniture Workers' strike was an economic strike, as the Board and the court below should have held in accordance with *Rogers Brothers, supra,* and the other decisions cited on this point in the Company's Petition to this Court.

CONCLUSION.

We again respectfully submit to this honorable Court that it is clear from the foregoing and the facts and authorities cited in the Petition that the decision of the court below with respect to the Company's right to a hearing and the nature of the strike was prejudicially erroneous. We further submit that this decision by the Sixth Circuit is in conflict with decisions of other courts of appeal, this Court has not settled the important questions of federal law presented in this

case, and the decision of the court below has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

We therefore earnestly renew the Company's request that its Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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